

STATE OF MICHIGAN
IN THE SUPREME COURT

BOARD OF TRUSTEES OF THE CITY
OF PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH AND
INSURANCE TRUST,

Supreme Court No. _____

Plaintiffs/Appellees,
v.

Court of Appeals No. 31-6418

CITY OF PONTIAC, Michigan,

Oakland County Circuit Court
Case No. 12-128625-CZ

Defendant/Appellant.

**DEFENDANT/APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

NOTICE OF HEARING

PROOF OF SERVICE

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STATEMENT IDENTIFYING ORDER APPEALED, INTRODUCTION & THE RELIEF SOUGHT

The City of Pontiac had been grappling with insolvency for many years. To address this problem, the Governor appointed an emergency manager for the City of Pontiac to act as a responsible steward. At all times relevant to this lawsuit, the emergency manager exercised his powers pursuant to PA 4; these powers included the ability to make temporary modifications to contracts and to modify, adopt, or repeal ordinances on behalf of the City Council. *See, e.g.*, MCL 141.1519.

The Emergency Manager for the City of Pontiac made many necessary, but difficult, decisions. By way of partial example only, the Emergency Manager made the following reductions: (1) he eliminated the police and fire department and contracted for these services from neighboring communities; (2) he terminated hundreds of employees and contracted for various services at a substantial savings to the City; (3) he sold millions of dollars of City owned property; and (4) he renegotiated multiple contracts and collective bargaining agreements. As part of the above cuts, the Emergency Manager suspended the City's obligation to make contributions to the Police and Fire VEBA, which is a trust created to provide health insurance to retired police and fire personnel. His Order effectuating the above stated:

[The Trust is] amended to remove [the] obligations of the City to continue to make contributions to the Trust as determined by the

Trustees through actuarial evaluations. The Order shall have immediate effect. (**Exhibit D.**)

In requesting permission to make the above modification from the State of Michigan, the Emergency Manager concisely explained:

“[t]he City will not be able to pay the expected VEBA contribution . . . for the fiscal year ending June 30, 2012, to the Trust. The termination of this obligation to the Trust will not create any hardship on the employees covered by the Trust who will continue to receive healthcare benefits. . . . (Exhibit B)(emphasis added.)

Based on the above language, both Plaintiff and the City agreed that the Emergency Manager suspended the City’s obligation to make the 2011-2012 contribution to the VEBA; the parties, however, disagreed on whether these actions were legal. The above modification to the VEBA resulted in this lawsuit and Plaintiff advanced several arguments. Plaintiff argued: (1) that the contractual modification violated the Michigan Constitution; (2) that the modification violated City Ordinance; and (3) that the modification breached the collective bargaining agreements/trusts. (**Exhibit F: Complaint.**) After extensive briefing, the lower court dismissed Plaintiff’s lawsuit in its entirety.

The Court of Appeals agreed with the lower court on every issue presented for appellate review. The Court of Appeals held that the City did not violate the Michigan Constitution. The Court of Appeals agreed that the City was allowed to modify the ordinance and collective bargaining agreement under PA 4. The Court of Appeals also agreed that the contract could be modified retroactively.

After having addressed every argument presented on appeal, the Court of Appeals created a new issue sua sponte. While agreeing that the Emergency Manager was authorized to modify the contract retroactively, the Court of Appeals found that the Emergency Manager's language did not effectuate his intent. The Court focused on the language of the Order, which provided that the Order "remove[d] [the contractual obligations] of the City *to continue* to make contributions to the Trust." The Court of Appeals found that the word *continue* only applied to "present or future" obligations and the Court determined that the \$3,473,923 was not a "present or future" obligation because it was already accrued. The Court of Appeal's holding was improper for two reasons.

As the money had not been paid by the City, it *still* was a *present* obligation and the Court's holding to the contrary was clear error. Just as problematic is the manner in which the Court of Appeals reached its holding. The Court of Appeals ignored a stipulated fact; the Court of Appeals sua sponte amended Plaintiff's Complaint; the Court of Appeals consulted parole evidence regarding an issue that had not been briefed; the Court of Appeals addressed an issue not preserved for appeal; and the Court of Appeals disregarded the plain language of the Order and the Emergency Manager's expressly stated intent.

The Court of Appeal's improper advocacy threatens the City of Pontiac's financial stability and could result in the appointment of another Emergency

Manager. The City of Pontiac requests that this Court grant leave to appeal and reverse the Court of Appeals because this case involves a significant public interest, namely – the financial solvency of a major Michigan City that recently ended its “financial emergency.”

QUESTIONS PRESENTED FOR REVIEW

ISSUE ONE: This case involves an Emergency Manager's modification of a collective bargaining agreement as allowed by Public Act 4. The Court of Appeals affirmed the trial court's dismissal of every cause of action pled. The Court of Appeals, however, interpreted the Emergency Manager's Order in a manner inconsistent with (1) the plain language of the Order, (2) Plaintiff's own interpretation of the Order, and (3) the Emergency Manager's interpretation of the Order. In fact, Plaintiff did not even argue the issue sua sponte raised by the Court of Appeals because the import of the Order was understood by all parties. Considering that the Court of Appeal's Opinion threatens insolvency for the City of Pontiac—a City that recently emerged from a “financial emergency”—did the Court of Appeals commit reversible error when it became an advocate for Plaintiff and decided an issue that had not been pled, briefed, or preserved?

ISSUE TWO: When the Emergency Manager sought permission from the State to modify the City's contractual liability to Plaintiff, he expressly stated that he was amending that City's obligation to pay amounts accrued in the 2011-2012 fiscal year. As the contribution had not been made, his Order stated that the City had no obligation to “continue to make” the disputed payment. Did the lower court

improperly interpret the Emergency Manager's Order when it held that the modification was not intended to apply to contributions due in the 2011-2012 fiscal year?

CONCISE STATEMENT OF PROCEEDINGS BELOW

This lawsuit was filed in August 2012 by both the Board of Trustees of the City of Pontiac Police and Fire Retirement System and the Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust. The Complaint contained six causes of action. On February 2, 2013, the trial court dismissed all claims filed by the Board of Trustees of the City of Pontiac Police and Fire Retirement System (Counts I, III, and V). These claims were not appealed.

The City of Pontiac's motion for summary disposition involved Counts II, IV, and VI. Count II alleged that the City violated Art 9, § 24 of the Michigan Constitution when the City temporarily stopped making contribution to the VEBA health care trust. Counts IV and VI alleged that the Emergency Manager violated a City Ordinance and the VEBA trust agreement. On May 1, 2013, after a lengthy oral argument, the trial court granted the City's Motion for Summary Disposition. Plaintiff appealed this Order.

On March 17, 2015, the Court of Appeals issued its opinion. The Court of Appeals affirmed the lower court on every claim pled by Plaintiff and ruled upon by the trial court. However, the Court of Appeals, sua sponte, held that the Emergency Manager's Order was ambiguous and did not say what the parties had agreed it said. The Court of Appeal's—without the benefit of any briefing on the issue—imposed \$3,473,923 of unexpected liability on a City that had just resolved its “financial

emergency” status. Because the City only exited the financial emergency due to the contractual adjustments that form the basis of this lawsuit, the Court of Appeal’s opinion may result in the appointment of a new emergency manager. Given the import of its opinion, and because there was no briefing on the issue (Plaintiff and Defendant agreed so there was no reason to brief it), the City filed a Motion for Reconsideration on April 6, 2015, which the Court of Appeals denied. This leave to appeal follows.

CONCISE STATEMENT OF MATERIAL FACTS

1. THE CITY OF PONTIAC'S FINANCIAL CONDITION NECESSITATED MANY CUTBACKS

It is no secret that many Michigan cities have faced trying economic times. Like many Michigan municipalities, the City of Pontiac has been confronted with (1) declining revenues due to diminishing property values/taxes; (2) a declining population due to a decrease in jobs; and (3) increasing expenditures as the cost to provide basic services continues to rise.

It is not disputed that the City has been running budget deficits for a number of years. In fiscal year ending June 30, 2008, the deficit was \$7,007,957; in fiscal year ending June 30, 2009, the deficit was \$5,607,638; in fiscal year ending June 30, 2010, the deficit was \$4,089,199. For fiscal ending June 30, 2012, the deficit was \$3,425,594. *See, e.g., City of Pontiac Retired Employees v City of Pontiac*, No. 12-12830, 2012 US Dist LEXIS 98858, at * 3 (ED Mich July 17, 2012); *see also* (Exhibit A: John Naglick's Affidavit.)

2. PUBLIC ACT 4

Michigan's municipalities are required by law to operate under a balanced budget. MCL 141.421 *et seq.* Cognizant that many Michigan municipalities were on the brink of insolvency, Michigan's legislature enacted the Local Government and

School District Fiscal Accountability Act (“the Act” or “PA 4”).¹ In enacting PA 4, the legislature stated its intent as follows:

The legislature hereby determines that the health, safety, and welfare of the citizens of this state would be materially and adversely affected by the insolvency of local governments and that the fiscal accountability of local governments is vitally necessary to the interests of the citizens of this state to assure the provision of necessary governmental services essential to public health, safety, and welfare. The legislature further determines that it is vitally necessary to protect the credit of this state and its political subdivisions and that it is necessary for the public good and it is a valid public purpose for this state to take action and to assist a local government in a condition of financial stress or financial emergency so as to remedy the stress or emergency by requiring prudent fiscal management and efficient provision of services, permitting the restructuring of contractual obligations, and prescribing the powers and duties of state and local government officials and emergency managers. The legislature, therefore, determines that the authority and powers conferred by this act constitute a necessary program and serve a valid public purpose.

Mich. Comp. Laws § 141.1503.

PA 4 provides that, in certain circumstances, the State of Michigan may appoint an Emergency Manager to a municipality to help stave-off economic ruin. The appointment of an Emergency Manager first requires extensive review and the determination that a “financial emergency” exists. Mich. Comp. Laws § 141.1513; § 141.1514; § 141.1515. Only after this process reveals that a “financial emergency” exists can an Emergency Manager be appointed.

¹ At all times relevant, PA 4 was a duly enacted law with full force and effect. It has since been replaced by PA 436.

Once appointed, an Emergency Manager has many tools at his disposal to address the financial emergency. One of these tools includes the ability to make changes to the terms and conditions of contracts and collective bargaining agreements. MCL 141.1519(1)(k). Likewise, an Emergency Manager has the ability to “[e]xercise solely, for and on behalf of the local government, all other authority and responsibilities of the chief administrative officer and governing body concerning the adoption, amendment, and enforcement of ordinances. . . .” MCL 141.1519.

Pursuant to PA 4, the City of Pontiac had a State appointed Emergency Financial Manager, Louis Schimmel.

3. THE CITY HAS TAKEN DRASTIC STEPS TO REDUCE ITS BUDGETARY PROBLEMS

Since the appointment of an Emergency Manager, by way of partial example, the City has taken the following steps to address the City’s financial crisis:

- The City eliminated its police department;
- The City eliminated its emergency dispatch services;
- The City eliminated its animal control services;
- The City eliminated its vital records department;
- The City eliminated its Fire Department;
- The City largely eliminated its Department of Public Works; and

- The City has contracted for many other services, such as accounting, payroll, building safety, planning, legal, income tax and public utilities and information services at significant savings.
- The City has separated itself from the Library Board and the Housing Commission, relieving the City of the obligation to provide administrative services to those agencies.
- The Emergency Manager has also negotiated new Collective Bargaining Agreements with the City's labor unions through June 30, 2013, which resulted in substantial savings.²

4. WHILE THE ABOVE REDUCTIONS HAVE CERTAINLY HELPED MOVE THE CITY IN THE RIGHT DIRECTION, THE CITY HAD TO ADDRESS CERTAIN LEGACY COSTS

Plaintiff alleges that the City should have paid \$3,473,923 to the VEBA for the fiscal year between July 1, 2011 and June 30, 2012. Because the City was unable to pay that sum, and because modifications could be made without impacting retiree health care,³ the Emergency Manager sought to relieve the City of this substantial burden.

In order to address the above financial problems, on July 10, 2012, the Emergency Manager—pursuant to his authority vested under PA 4—requested permission from the State of Michigan to temporarily suspend the City's obligation

² See Emergency Manager's Orders and Press Releases at http://www.pontiac.mi.us/emergency_finance_manager/emergency_manager_executive_orders.php.

³ As the Emergency Manager explained in **Exhibit B**, temporarily suspending the City's contribution to the Police and Fire VEBA would not create any hardship for the VEBA's beneficiaries who will continue to receive health insurance. **As the Police and Fire VEBA existed at the time this lawsuit was dismissed, it had enough assets to pay for all health insurance expenditures for approximately ten years.** (Exhibit B.)

to make contributions to the Police and Fire VEBA.⁴ (**Exhibit B.**) The stated intent of this letter was to temporarily modify the City's obligation to make the payment accrued in the fiscal year July 1, 2011 through June 30, 2012. He specifically stated that

“[t]he City will not be able to pay the expected VEBA contribution . . . for the fiscal year ending June 30, 2012, to the Trust. The termination of this obligation to the Trust will not create any hardship on the employees covered by the Trust who will continue to receive healthcare benefits. . . .

On July 16, 2012, the State Treasurer determined that—pursuant to Public Act 4—the City could temporarily stop making contributions to the Police and Fire VEBA. (**Exhibit C.**) State Treasurer Dillon confirmed the following:

- The City lost 22% of its tax base from 2010 to 2011;
- City property tax revenue decreased from \$12.9 million in 2007 to \$10.9 million in 2012;
- City income tax decreased from \$13.3 million in 2007 to \$8.7 million in 2010;
- The City has a residential housing vacancy rate of 18%; and
- The City's population has plummeted. (**Exhibit C.**)

4 The Police and Fire VEBA was created to provide prefunded health insurance benefits to retired police and fire employees.

As such, the State Treasurer determined that a cessation of the City's obligation to contribute to the Police and Fire VEBA was "reasonable and necessary" to serve a "significant and legitimate public purpose." (**Exhibit C.**)

On August 1, 2012, the Emergency Manager issued Executive Order 225 to amend the trust pursuant to MCL 141.1519(1)(k) of 2011 PA 4, to terminate the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012. The order read with respect to its substantive provision as follows:

Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect.

(**Exhibit D.**)

5. THE COURT OF APPEALS' OPINION

Regarding every issue pled by Plaintiff and preserved for appeal, the Court of Appeals affirmed summary disposition for the City. The Court of Appeals held that the modification did not violate the constitution. The Court of Appeals held that the City did not violate the ordinance or contract at dispute. The Court of Appeals even held that the City could make the contractual modifications retroactive. (**Exhibit I.**)

The Court of Appeals, however, interpreted the Order's language of "to continue" and determined that it only applied to "present" obligations. If the

Court of Appeals' interpretation is correct that "to continue" means "present" obligations, there is no dispute that the \$3,473,923 was presently owed and had not been paid. It was, and continues to be, a "present" obligation. As the Court of Appeals interpreted a stipulated fact, there was no opportunity to brief this issue. The Court of Appeals became an advocate, which is not permissible in our model of jurisprudence.

**LEAVE TO APPEAL SHOULD BE GRANTED
FOR THE FOLLOWING REASONS**

MCR 7.302(B)(1)-(6) outlines the grounds for leave to appeal to the Supreme Court. The City of Pontiac contends that the following grounds are applicable to this leave to appeal:

- “[T]he issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer’s official capacity.” MCR 7.302(B)(2).
- “[T]he issue involves legal principles of major significance to the state’s jurisprudence.” MCR 7.302(B)(3).
- “[I]n an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice. . .” MCR 7.302(B)(5).

This lawsuit involves a Michigan municipality that was recently under the control of an Emergency Manager (it still has a Transition Advisory Board) and is in receivership. Not only does this appeal involve a City, the Court of Appeal’s sua sponte holding may result in the appointment of a new emergency manager. The Court of Appeals may have created a pyrrhic victory for Plaintiff because it is an unsecured creditor and bankruptcy is an unfortunate possibility. As will be explained below, the Court of Appeals was “clearly erroneous” for two reasons. It was not proper for the Court of Appeals to become an advocate and raise claims never pled or preserved. It also erred in reading the plain and unambiguous Order

and created an ambiguity where none existed. The City has suffered material injustice because it did not have the opportunity to respond to claims never advanced by Plaintiff that significantly impact the City and its residents.

1. THE COURT OF APPEALS SHOULD NOT HAVE BECOME AN ADVOCATE FOR PLAINTIFF

As the United States Supreme Court has explained, courts “rely on the parties to frame the issues for decision,” as “[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” *Greenlaw v United States*, 554 US 237, 243, 244; 128 S Ct 2559; 171 L Ed2d 399 (2008) (internal quotations marks omitted). The *Greenlaw* Court went on to further observe that courts “do not, or should not sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties.” *Greenlaw*, 128 S Ct at 2564 (quoting *United States v Samuels*, 808 F2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring)).

In our model of jurisprudence, it is widely accepted that procedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many other countries. “What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments

pro and con adduced by the parties.” *McNeil v Wisconsin*, 501 US 171, 181, n. 2; 111 S Ct 2204; 115 L Ed2d 158 (1991). In an inquisitorial system, the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves. Consistent with the above, Michigan’s Supreme Court has held:

it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right.

Napier v Jacobs, 429 Mich 222, 228-229; 414 NW 2d 862, 864 (1987).

In this case, regarding its breach of contract claim, Plaintiff only argued that the Emergency Manager did not have legal authority to retroactively modify contracts. Plaintiff did not argue, however, that the Emergency Manager did not actually do what he set out to accomplish. The Court of Appeal’s interpretation of the Emergency Manager’s Order utilizing parol evidence was an issue not raised by the Plaintiff in its Complaint, not ruled on by the trial court, and not briefed by the parties. In fact, Count IV of Plaintiff’s Complaint alleged violation of Ordinance and Breach of Trust and stated at paragraph 61 that “[the] City has failed to timely makes

its contributions to the Trust for fiscal year July 1, 2011 - June 30, 2012, and has further indicated that it will not make this contribution” and in the prayer for relief, para. 63 (a) provides, “Declare the defendant has violated its ordinance by its failure to pay its annual contribution to the trust for fiscal year July 1, 2011 – June 30, 2012.” (**Exhibit F.**)

As this Court can see, Plaintiff had conceded that the Emergency Manager modified its obligation to pay the 2011-2012 contribution. Plaintiff’s presentation centered on the question of whether the modification was legal—not whether it actually occurred. If it had not occurred, there would be no point to this entire lawsuit. Not once did Plaintiff argue that the 2011-2012 contribution had not, in fact, been modified. Plaintiff’s response to the City’s motion for summary disposition before the trial court did not raise any issue with respect to the Emergency Manager’s Order applying only prospectively to fiscal year July 1, 2012 through June 30, 2013 based on the language of the Emergency Manager’s Order. (**Exhibit G**). Furthermore, Plaintiff’s brief on appeal only raised the issue of whether the Emergency Manager’s Order violated P.A. 4. (**Exhibit H** at pp. 12-14). Plaintiff has only argued that the Emergency Manager had entered an Order retroactively extinguishing an obligation to contribute and raised the legal argument, that Order was not permitted under MCL 141.1519. (**Exhibit H**).

The Court of Appeals should not have, on its own initiative, decided issues not raised by the parties, not properly briefed, and in which the record is lacking. Given the import of the Court of Appeals decision, this judicial advocacy was not prudent. Had there been a question not raised that should be considered, it should have been, at most, remanded for proper consideration. In this matter, the Court of Appeals was not a court of primary jurisdiction.

2. THE COURT OF APPEALS' INTERPRETATION OF THE ORDER IS CONTRARY TO THE PLAIN LANGUAGE OF THE ORDER AND THE EMERGENCY MANAGER'S EXPRESS INTENT

As the Michigan Supreme Court has repeatedly instructed, the fundamental obligation when interpreting statutes is "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW 2d 34 (2002). And, beyond the necessity for legal citation, if the statute is unambiguous, judicial construction is neither required nor permitted. In other words, "[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute." *Id* (emphasis added); *see also Paige v City of Sterling Heights*, 476 Mich 495; 645 NW2d 34 (2006). It is also well established that, "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Walters v Nadell*, 481 Mich 377, 381-382; 751 NW2d 431 (2008).

In the present action, the Emergency Manager advised the State of Michigan that the City could not make the 2011-2012 contribution to the Trust and sought to modify the contract. (**Exhibit B**) (stating that “[t]he City will not be able to pay the expected VEBA contribution . . . for the fiscal year ending June 30, 2012, to the Trust. The termination of this obligation to the Trust will not create any hardship on the employees. . . .”) In order to effectuate his expressly stated intention, the Emergency Manager read with respect to its substantive provision as follows:

Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect.

(**Exhibit D.**) The express language states that the City was not required to “continue to make contributions” to the Trust. As the 2011-2012 obligation had not yet been paid, the Order provided that there was no obligation “to continue to make” the contribution. There is no other reasonable reading of this Order and the Court of Appeal’s holding creates a dangerous and absurd result.

As the Court of Appeals opted to consult parol evidence, is puzzling how it could read the Emergency Manager’s letter to state and determine that he was only considering contributions in the 2012-2013 year. His letter expressly states that “[t]he City will not be able to pay the expected VEBA contribution . . . for the fiscal year ending June 30, 2012” and that the City was “terminat[ing] . . . this obligation.”

Had the Order been ambiguous, the parol evidence states what the parties to this action always knew: the Emergency Manager suspended the City's obligation to make the 2011-2012 payment. The Court of Appeal's interpretation of the Order was clear error and resulted in substantial harm to the City of Pontiac and the State of Michigan.

RELIEF REQUESTED

For the reasons stated above, the City of Pontiac asks that the Court grant leave to appeal.

GIARMARCO, MULLINS & HORTON, P.C.

By: /s/ Stephen J. Hitchcock

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Attorney for Defendant/Appellant

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Dated: June 4, 2015

NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing on this Application for Leave to Appeal will be brought on for hearing before the Supreme Court on Tuesday, June 30, 2015, or as soon thereafter as the matter may be heard.

GIARMARCO, MULLINS & HORTON, P.C.

By: /s/ Stephen J. Hitchcock
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Dated: June 4, 2015

PROOF OF SERVICE

JOAN M. FLYNN states that on the 4th day of June, 2015, she did serve a copy of the Application for Leave to Appeal, Notice of Hearing, and this Proof of Service upon:

Clerk of the Court

Michigan Court of Appeals
201 W. Big Beaver Road, Ste. 800
Troy, MI 48064-4127
SERVED VIA: TrueFiling e-file system

Clerk of the Court

Oakland County Circuit Court
1200 N. Telegraph Road
Pontiac, MI 48341
SERVED VIA: TrueFiling e-file system

Matthew I. Henzi, Esq.

Sullivan Ward Asher & Patton, PC
25800 Northwestern Hwy., Ste. 1000
Southfield, MI 48075-8412
Email: mhenzi@swappc.com
SERVED VIA EMAIL AND
FIRST CLASS MAIL

by the means stated for each party, accordingly.

/s/ Joan M. Flynn

JOAN M. FLYNN

EXHIBIT A

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*

COA No. 316418

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

AFFIDAVIT OF JOHN NAGLICK

STATE OF MICHIGAN)
) SS.
 COUNTY OF OAKLAND)

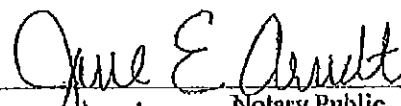
JOHN NAGLICK being first duly sworn, states as follows:

1. I make this affidavit based upon personal information, knowledge, and belief, and if called as a witness, I can competently testify under oath to the facts set forth herein.
2. I am the Chief Financial Officer for the City of Pontiac and hold the position of Finance Director.
3. I am a licensed CPA in the State of Michigan and hold a BBA in Accounting, MBA in Finance and the American Institute of Certified Public Accountants credential "Certified in Financial Forensics."
4. I have reviewed the City of Pontiac's Brief in Support of its Motion for Summary Disposition in Case Number 12-128625-CZ.
5. The facts contained in Sections 2, 4, and 5 of the Fact Section are true and accurate.

Further, Affiant sayeth not.


 JOHN NAGLICK

Subscribed and sworn to before me
 this 4th day of March, 2013.


 Notary Public
 Oakland County, MI
 Acting in Oakland County, MI
 My Commission Expires: Oct. 3, 2014

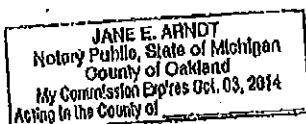


EXHIBIT B

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL



CITY OF PONTIAC
OFFICE OF THE EMERGENCY MANAGER
LOUIS H. SCHIMMEL

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July 10, 2012

Hon. Andrew Dillon, Treasurer
 State of Michigan
 Michigan Department of Treasury
 Lansing, MI 48922

Re: City of Pontiac/Action Under Section 19(k) of the Local Government and the School District Accountability Act Related to Local 376, Pontiac Fire Fighters Union ("PFFU"), Pontiac Police Officers Association ("PPOA") and Pontiac Police Supervisors Association ("PPSA")

Dear Treasurer Dillon:

During my tenure as Emergency Manager for the City of Pontiac, I have taken steps to reduce the cost of active employee and retiree healthcare. During the course of these efforts, I have worked with Meadowbrook Insurance ("Meadowbrook") in reviewing various healthcare, dental insurance plans and other plans provided to both active employees as well as retirees.

Part of the plans that were in existence when I arrived included a Declaration of Trust and Agreement of the City of Pontiac Police and Fire Retiree Pre-Funded Group Health and Insurance Plan dated August 26, 1996 (Police and Fire Retiree VEBA). This plan was a result of collective bargaining agreements between the above-captioned bargaining units on behalf of police officers and fire fighters which provided for a pre-funded Trust Agreement for retirees of the above-captioned bargaining units who retired on or after August 22, 1996. This plan and Trust provided for pre-funding of the obligations by the employer, City of Pontiac that covered retirees' healthcare benefits. As of March 31, 2012, the VEBA has assets of \$30,891,367. Police and fire retirees prior to August 22, 1996, do not have a similar pre-funded plan in place and the City is paying for their annual healthcare costs on a current cash flow basis.

Article III of the Trust Agreement, Section 1 provides:

"(a) The City-Employer shall be required to pay to the Trust Fund such amounts as the Trustees may determine are actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the Actuary for the Trust to result in Pre-funded Plan.

Such contributions shall also be made in accordance with the Collective Bargaining Agreement between the collective bargaining associations and the employer and this Trust Agreement, and such other regulations of the Board of Trustees as are not inconsistent with the aforesaid authority.

(b) In addition to the amounts paid by the City on behalf of Participants as set forth above and in the Collective Bargaining Agreements, the City shall contribute to the Trust Fund such additional moneys which together with those contributions and return on investments shall be sufficient to fund the benefits provided on a sound actuarial basis."

It is anticipated that the City will be required by the Trustees of the VEBA to contribute \$3,915,371 during the fiscal year ending June 30, 2013. This amount exceeds the projected actual costs of the benefits for the retirees covered by this Trust for the same fiscal year by approximately \$915,000.

Given the City's current financial condition it is difficult for the City to make annual payments for current costs of retiree healthcare without the additional burden of the pre-funding costs of this VEBA as determined by the actuaries selected by the Trustees.

Article X, Section 1, of the Trust provides:

"The provisions of this Declaration of the Trust Agreement may be amended at any time, by (A) collective bargaining between the collective bargaining associations identified in Article I, Section 8 and the City of Pontiac (B) by an unanimous vote of the five (5) Trustees, concurred in by the City Council of the City of Pontiac provided, however, that such Amendments are not inconsistent with any applicable Collective Bargaining Agreements and do not adversely affect the tax exempt status of the 501(c)9 Trust. Except as otherwise provided in this Trust Agreement, the Trustees shall have no power in amending the provisions of this Trust Agreement with respect to the amount of contributions required by the City."

This correspondence is to advise you that in my capacity as Emergency Manager of the City, I am seeking to invoke the actions allowed under Section 19(k) regarding collective bargaining agreements as provided in the Local Government and School District Accountability Act ("Act") MCL 141.1519(k). Section 19(k) provides that both the Emergency Manager and State Treasurer shall determine that four conditions are satisfied in order to allow modification of the existing collective bargaining agreement. I am seeking to amend the Trust Agreement through modification of the collective bargaining agreement to remove Article III, obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. By eliminating the City's obligation to contribute to the Trust the Trustees can pay for the current annual obligations for healthcare for the retirees covered by the Trust Agreement until the Trust assets are exhausted.

I have not met with the PPWU, PPOA or PPSSA since those unions no longer exist as a result of subcontracting out police and fire services for the City. Therefore, there are no active associations for any of these unions with which to negotiate this change.

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In conversations with members of the Board of Trustees, I, as Emergency Manager, am aware that the five Trustees of the Trust would not unanimously agree to any modifications of this Trust Agreement with respect to the contribution by the City. Unanimous agreement of the Trustees is required under Article X of the Trust Agreement for any amendment initiated by the Trustees. Therefore based on my inability to negotiate with the unions and my inability to obtain amendment by the Trustees there is no prompt or satisfactory resolution to this problem other than exercise of my rights under Section 19(k) with concurrence by Treasury.

I have determined that all the following conditions of Section 19(k) have been satisfied to modify the Trust Agreement through collective bargaining agreement changes as set forth above.

(i) the financial emergency in a local government has created a circumstance in which it is reasonable and necessary for the State to interfere to serve a significant and legitimate purpose.

The City was unable to make its contributions as determined by the Trustees to this YERBA for the fiscal year ending June 30, 2011. As a result the YERBA sought to collect that amount through a lawsuit filed against the City which resulted in a judgment against the City in the amount of \$3,243,232. Unless action is taken to eliminate the YERBA contribution obligation the City anticipates that it will not be able to make the annual contribution required by the Trustees in June 2012, and for subsequent years thereafter. The Trust has adequate assets to pay for current obligations for healthcare benefits for the retirees covered by the Trust for a significant number of years going forward. I am also in the process of modifying the healthcare benefits for those retirees which over time will reduce the amount of the obligations of the City and/or Trustees to fund healthcare benefits for the retirees covered by this Trust.

(ii) any plan involving the rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement as reasonable and necessary to deal with the broad, generalized equalized problem.

The City will not be able to pay the expected YERBA contribution of \$4,381,269 for the fiscal year ending June 30, 2012, to the Trust. The termination of this obligation to the Trust will not create any hardship on the employees covered by the Trust who will continue to receive healthcare benefits paid for by the assets of the Trust. The amount saved in fiscal year beginning in July 1, 2012, by a modification of the collective bargaining agreements obligations to the Trust will significantly contribute to the City's ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year beginning June 1, 2012, and thereafter.

(iii) any plan involving the rejection, modification, or termination of one or more terms of existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public as a whole.

The above action will not only produce cost savings to the City but will contribute to the City's ability to reach a balanced budget without affecting the healthcare benefits of the retirees covered by the Trust.

(iv) any plan involving the rejection, modification, or termination of one or more terms of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

The proposed modifications to the Trust through contract modifications are for the term of the emergency manager services and therefore are of a temporary nature subject to review and renewal by the City.

Should you approve this action the City will also seek appropriate concurrence from the Internal Revenue Service under an exemption for the Trust that was received from the IRS for the Trust, under Internal Revenue Code Section 501(c)(9) Employee Welfare Benefit Plans.

Based on the foregoing, I request your written concurrence with my determination pursuant to Section 19(k) of the Act. Time is of the essence. The new fiscal year starts July 1, 2012. In order to have maximum impact on the 2012/2013 fiscal year given the time frames of notice to the Trustees of this action, I urge prompt consideration for this request.

Sincerely,


Louis H. Schimmel
Emergency Manager

cc: Roger Piasor, Deputy State Treasurer

EXHIBIT C

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

72 (Rev. 01-11)



STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RIK SHYOR
GOVERNOR

ANDY DILLON
STATE TREASURER

July 16, 2012

Louis H. Schimmel, Emergency Manager
City of Pontiac
47450 Woodward Avenue
Pontiac, Michigan 48342

Dear Mr. Schimmel:

Thank you for your July 10, 2012 letter, which is enclosed for reference. As the Emergency Manager for the City of Pontiac, you have asked for my concurrence with your determination to modify collective bargaining agreements related to Local 376, the Pontiac Fire Fighters Union, Pontiac Police Officers Association, and Pontiac Police Supervisors Association pursuant to Public Act 4 of 2011, the Local Government and School District Fiscal Accountability Act. The proposed modification would affect health care contributions to a VBBA for individuals who are covered by these collective bargaining agreements and retired after August 22, 1996.

As you are aware, the City is facing a broad, generalized economic problem, as illustrated by the following statistics:

1. The City lost approximately 22 percent of its tax base from 2010 to 2011. Due to restrictions in the Michigan Constitution upon property tax increases, even as economic conditions improve, the City will be able to recover its tax base only at the annual rate of 5 percent or inflation, whichever is less.
2. City property tax revenue decreased from \$12.9 million in fiscal year 2007 to \$10.9 million in fiscal year 2010.
3. City income tax revenue decreased from \$13.3 million in fiscal year 2007 to approximately \$8.7 million in fiscal year 2010.
4. While City general fund expenditures decreased from \$56.1 million in fiscal year 2007 to \$47.2 million in fiscal year 2010, general fund revenues decreased during the same period from \$54.2 million to \$38.4 million.
5. The City has a residential housing vacancy rate of 18 percent (per the 2010 Census compared to an 8 percent vacancy rate per the 2000 Census) and more than 4,700 vacant buildings.

July 25, 2012
Page 2 of 3

6. The City population declined by 12 percent between 2000 and 2010, decreasing by 7,991 from 67,506 to 59,515.

Section 19(1) (k) of the Act authorizes emergency managers to reject, modify, or terminate one or more terms and conditions of an existing collective bargaining agreement. In order to do so, however, the Emergency Manager and State Treasurer must both determine that the following four conditions of Section 19(1) (k) have been satisfied:

- (i) The financial emergency in the local government has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a significant and legitimate public purpose.
- (ii) Any plan involving the rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.
- (iii) Any plan involving rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public, as a whole.
- (iv) Any plan involving the rejection, modification, or termination of one or more terms and conditions of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

I have reviewed your determination in this regard and agree that all four statutory conditions have been satisfied. In particular, I find that:

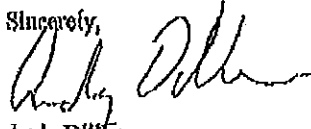
1. The financial emergency in the City is such that it is reasonable and necessary for the State to intercede in this instance to serve a significant and legitimate public purpose. While improvements have been made to the City's financial condition, additional cost reductions remain essential to the City's long term viability.
2. The proposed modification of the collective bargaining agreements as to retiree health care contributions to a VBBA is reasonable and necessary to help address the City's broad generalized financial emergency. Analysis demonstrates that the proposed additional changes to language relating to retiree benefits can save the City approximately \$3.9 million annually, which would make a positive impact upon the City's deficit.
3. The modification of collective bargaining agreements is critical to permit further reduction in the total cost of retiree health care, and is directly related to and designed to address the City's financial emergency.
4. The proposed modification of the collective bargaining agreements is temporary, involves all retirees, and does not target specific classes of employees.

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July 25, 2012
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Therefore pursuant to Section 19(1) (k) of the Act, I have also determined that the above statutory conditions have been satisfied and that the proposed changes to the collective bargaining agreements are necessary and appropriate.

Sincerely,



Andy Dillon
State Treasurer

Enclosure

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EXHIBIT D

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL



CITY OF PONTIAC
OFFICE OF THE EMERGENCY MANAGER
LOUIS H. SCHIMMEL

47450 Woodward Avenue
 Pontiac, Michigan 48342
 Telephone: (248) 758-3133
 Fax: (248) 758-3292

Dated: August 1, 2012

ORDER NO. S-225

RE: IAFP Local 376; Pontiac Police Officers Association; Pontiac Police and Supervisors Association; Contract Provision Termination, VEBA Contribution

TO: Sherlita Hawkins, City Clerk
 Cathy Square, Human Resources Director
 Pontiac Police and Firemen's Voluntary Employee Benefit Association

The Local Government and School District Fiscal Accountability Act (Public Act 4 of 2011) in Section 17(1) empowers an Emergency Manager to issue the orders the Manager considers necessary to accomplish the purposes of the Act and any such orders are binding on the local officials or employees to whom they are issued. Section 19(1) provides that an Emergency Manager may take on one or more additional actions with respect to a local government in receivership: (g) Make, approve or disapprove any appropriation, contract, expenditure...; (k) After meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment, a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state's sovereign powers if the emergency manager and the state treasurer determine that all of the following conditions are satisfied...; (l) Act as sole agent of the local government in collective bargaining with employees or representatives and approve any contract or agreement; (m) Take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government. The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities...; and 19(2) ...the authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government under law, charter, and ordinance shall be suspended and vested in the Emergency Manager.

Unlike with the other bargaining units currently active in the City, I have been unable to negotiate any changes to any collective bargaining agreement to allow for termination of those sections of the Collective Bargaining Agreement with the respective unions listed above

Order No. S-225 Page 1 of 2

concerning contributions to the VBBA for those individuals who are covered by these Collective Bargaining Agreements and retired after August 22, 1996 because those unions no longer exist at the local level and as such do not represent any active employees.

On July 10, 2012, I requested that the State Treasurer concur in my determination under Section 19(k) of the Local Government and School District Fiscal Accountability Act, Public Act 4 of 2011 (Act) to allow termination of those sections of the Collective Bargaining Agreement with the unions listed above concerning contributions to the VBBA for those individuals who are covered by these Collective Bargaining Agreements and retired after August 22, 1996 due to the nonexistence of the above listed unions (at least at the local level).

As stated in the July 10, 2012 correspondence to the State Treasurer, in my sole discretion and judgment, and due to the nonexistence of the above listed unions (at least at the local level), a prompt and satisfactory resolution of outstanding issues is unlikely to be obtained. Therefore, I determined that the four conditions of Section 19(k) of the Act had been satisfied.

On July 16, 2012, the State Treasurer concurred with my determination and made his separate determination (see attached) that the four conditions of Section 19(k) of the Act had been satisfied.


It is hereby ordered:

- Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations.

The Order shall have immediate effect.

Copies of the documents referenced in this Order are to be maintained in the offices of the City Clerk and may be reviewed and/or copies may be obtained upon submission of a written request consistent with the requirements of the Michigan Freedom of Information Act and subject to any exemptions contained in that state statute and subject to any exemptions allowed under that statute (Public Act 442 of 1976, MCL 15.231, et. seq.).

This Order is necessary in order to carry out the duties and responsibilities required of the Emergency Manager as set forth in the Local Government and School District Fiscal Accountability Act (Public Act 4 of 2011) and the contract between the State of Michigan and the Emergency Manager.



Louis H. Schimmel
City of Pontiac
Emergency Manager

cc: State of Michigan Department of Treasury
Mayor Leon B. Lukowski,
Pontiac City Council

EXHIBIT E

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

DECLARATION OF TRUST AND AGREEMENT OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH
AND INSURANCE PLAN

AUGUST 22, 1996

THIS DECLARATION OF TRUST AND AGREEMENT OF THE CITY OF PONTIAC, MICHIGAN POLICE AND FIRE PREFUNDED RETIREE GROUP HEALTH AND INSURANCE PLAN is made and entered into this 22nd day of August, 1996, by the CITY OF PONTIAC, MICHIGAN (hereinafter "City") and the Trustees of the CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE PLAN ("Plan") and any successor Trustees.

WHEREAS, the City is desirous of establishing a prefunded group health and insurance plan for certain retired Police Officers and Firefighters represented by applicable Police and Fire collective bargaining associations, and

WHEREAS, certain collective bargaining associations and the City have entered into separate Collective Bargaining Agreements which include certain health and life insurance benefits, (including dental and optical benefits), and

WHEREAS, the parties are desirous of establishing this declaration of trust and agreement for the purposes of creating and maintaining a Trust Fund which will conform to all applicable federal statutes and regulations, state and local laws,

WHEREAS, the City notes the cost savings involved with respect to the history regarding this proposal.

NOW, THEREFORE, the parties agree that the "Declaration of Trust and Agreement" of the (City of Pontiac, Michigan Police and Fire Retirees Prefunded

Group Health Plan) is hereby established to provide funding for health, optical, and dental insurance and life benefits for retirees of the Police and Fire Departments of the City of Pontiac who were members of the Police and Fire Retirement System of the City of Pontiac who retired on or after August 22, 1996.

ARTICLE 1

Definitions

The following definitions shall govern the following terms when used in this Agreement, unless otherwise specifically required by the context.

~~Section 1: Administrator - The person, persons, firm, corporation or insurance company or companies, appointed by the Trustees to administer the Trust.~~ The Administrator shall be responsible for the day today operations of the Trust who shall carry out the directives of the Trustees and who shall report and act consistent with the directives of the Chairman of the Board of Trustees as to any matters which require direction between meetings of the Board of Trustees.

Section 2: Collective Bargaining Agreements - The term Collective Bargaining Agreements as used herein, shall mean any written agreement, supplemental agreement, memorandum of understanding, final arbitrator's decision, judicial decision or decision of any public board or agency, by and between applicable Police and Fire collective bargaining associations and the City, and in any amendments, continuations, or renewals, which require the City or any other entity to make payments into group life, health and hospitalization insurance and dental and optical programs for employees represented by the applicable Police and Fire Retirement System of the City of Pontiac.

Section 3: Contributions - The term Contributions as used herein, shall mean the payment required to be made to the Trustees and to the Trust Fund by the City under the authority such as ordinance or City Council resolution or under any

applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan.

Section 4: Participant - The term Participant as used herein, shall mean any person meeting all of the following requirements:

- (1)(A) who was a sworn employee of the Police Department or uniform employee of the Fire Department of the City of Pontiac and who was a member of the Police and Fire Retirement System of the City of Pontiac and who was a member of one of the collective bargaining associations which has negotiated to participate in this Trust, immediately prior to retirement with benefits from the Police and Fire Retirement system of the City of Pontiac.
- (B) who retired with a service retirement or a duty disability retirement or a non-duty disability retirement on or after August 22, 1996, and
- (C) who in the case of a service retiree or non-duty disability retiree obtained at least ten (10) years of service credit in the Police and Fire Retirement System of the City of Pontiac by actual service as a Police Officer or Firefighter for the City of Pontiac excluding any other type of service credit such as military service credit, Reciprocal Retirement Act service credit, etc.
- (D) who was a sworn employee of the Police Department or employee of the Fire Department of the City of Pontiac and who was a member of the Police and Fire Retirement System of the City of Pontiac who was not eligible (pursuant to applicable law) to be a member of one of the three collective bargaining associations which has negotiated to participate in this Trust immediately prior to retirement with benefits from the Police and Fire Retirement System of the City of Pontiac.

or

(2)(A) The spouse and

- (B) any minor children during the period as provided by the Plan at the time of the Participant's (as defined above) retirement from the City of Pontiac and subject to any collective bargaining provisions.

and shall be in accordance with the resolutions and decisions of the Trustees, so long as the allowance by the Trustees of any such persons to participate in the Plan is not prohibited by the insurance laws and regulations of the State of Michigan, the United States Internal Revenue Code, any applicable federal law, and the rules, regulations and court decisions governing those statutes.

Section 5: "Employer" or "City" shall mean the City of Pontiac, Michigan.

Section 6: Plan or Plans - The term Plan or Plans as used herein, shall mean the Plan or Plans, programs, methods and procedures for providing the health, dental, optical and life insurance benefits contemplated herein for the making of regular contributions to the Trustees of the Trust Fund, as the payment by the Trustees of benefits from the Trust Fund, or the securing of benefits from the Plan, in accordance with the rules and regulations relating to eligibility requirements, amount in computation of benefits, and the general administration and operation of the Trust Fund, as the Trustees may, from time to time, adopt in any amendments to this Trust Agreement or modifications thereof. The Plan shall be the City of Pontiac Police and Fire Retiree Prefunded Health and Insurance Plan, effective August 22, 1996, a copy of which is attached hereto.

Section 7: Insurer - Any duly authorized commercial insurance company which may insure any of the beneficiaries of this Trust.

Section 8: Trustees - The term Trustees as used herein, shall mean the Trustees nominated and appointed and successor Trustees designated in the manner provided in this Declaration of Trust.

Section 9: Collective Bargaining Associations - Collective Bargaining Associations are those of the following associations which have negotiated to participate in this Trust:

Pontiac Firefighters Union, Local 376 ("PFFU")

Pontiac Police Officers Association ("PPOA")

Pontiac Police Supervisor's Association ("PPSA")

ARTICLE II

Establishment of Trust

Section 1: The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan established in accordance with the terms of the Trust Fund. The Grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution.

Section 2: The principal office and site of the Trust Fund shall be 450 Wide Track Drive, East, Pontiac, Michigan 48342. The Trustees shall have the power to move the principal office of the Trust to another location and to establish other offices, as they deem necessary.

Section 3: This Trust is created as an Internal Revenue Code 501(c)9 Trust (VEBA) and is created ~~for the exclusive purpose of providing through policies~~ issued by duly licensed commercial insurance companies, through a fund of self-insurance, or through any other lawful means of providing insurance, group health and hospitalization and dental and optical insurance, ~~in accordance with the Collective Bargaining Agreements between the City and applicable Police and Fire~~ collective bargaining associations, for the benefit of their Police and Fire retirees and beneficiaries who are eligible to participate in accordance with the Plan for

such insurance benefits under the rules and regulations established by the Trustees, pursuant to the provisions of the Collective Bargaining Agreements.

Section 4: The Trust described herein shall be irrevocable and shall conform to all applicable sections of the Internal Revenue Code, the Collective Bargaining Agreements requiring payments to the Trust Fund, the Statement of Purposes set forth in this Trust Agreement, and all statutes, ordinances, rules, regulations, arbitrators' awards and judicial decisions interpreting the foregoing provisions.

Section 5: The Trust Fund shall consist of City-Employer contributions, any contributions which may be paid by Participants and beneficiaries due to retirees electing additional coverage than that provided by the City per collective bargaining, all investments made or held under Trust, and all income therefrom, both received and accrued, and any other property, which may be received or held by reason of this Trust.

Section 6: No part of the net earnings of the Trust may inure to the benefit of any Participant or beneficiary other than by benefit payments or for services provided to the Trustees in their administration of this Trust. A portion of net earnings may be used for payment for reasonable and necessary professional services and costs and expenses related to assist the Trustees and Administrator in the operation of the Trust. The Trustees shall determine what costs, fees and professional services are reasonable and necessary.

ARTICLE III

Contributions to the Trust Fund

Section 1: (a) The City-Employer shall be required to pay to the Trust Fund such amounts as the Trustees may determine are actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan

consistent with actuarial valuations and calculations made by the Actuary for the Trust to result in a Prefunded Plan.

Such contributions shall also be made in accordance with the Collective Bargaining Agreements between the collective bargaining associations and the employer City and this Trust Agreement, and such other regulations of the Board of Trustees as are not inconsistent with the aforesaid authority.

(b) In addition to the amounts paid by the City on behalf of Participants as set forth above and in the Collective Bargaining Agreements, the City shall contribute to the Trust Fund such additional moneys which together with those contributions and return on investments shall be sufficient to fund the benefits provided on a sound actuarial basis. Participants shall contribute those amounts required for additional extended Family Riders in effect as of 8-22-96 and otherwise as determined by the Trustees.

(c) In the event that such authority or the Collective Bargaining Agreements do not set forth the time and place of payments, the manner of such payments, the procedures and forms to accompany said payments, and in the event these matters are not set forth in this Trust Agreement, then the Trustees may in their discretion decide the time, manner and means of payments, the procedures to be followed in making the payments, and the forms required to accompany said payments to said Trustees. Upon determination by the Trustees of these matters, the Trustees shall provide written notice to the City and to the collective bargaining associations and require payments by the employer City to be made pursuant to said rules and regulations.

Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this Trust Fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the Trust and the providing of benefits under various insurance programs.

Section 4: Nothing contained herein shall be deemed to modify or limit in any way the rights that the parties to the Collective Bargaining Agreements may have, any supplements or memoranda thereto, or any arbitrator's award to enforce collection of any amounts due to this Trust Fund, including the right of the parties to sue for same.

ARTICLE IV

Trustees

Section 1: The Fund shall be administered by five (5) Trustees as follows:

Mayor of the City of Pontiac
 Finance Director of the City of Pontiac
 Firefighter Trustee of the City of Pontiac
 Police Officer Trustee of the City of Pontiac
 A person unanimously selected by the above four Trustees
~~(Said fifth Trustee may also be a Participant of the Trust.)~~

Each Trustee shall be a fiduciary and have fiduciary responsibilities under applicable law and shall act prudently and in the best interests of the Trust.

Section 2: The Trustees who are hereby appointed as Trustees of the Trust are listed below:

The five (5) Trustees are:

1. Walter L. Moore
2. Hasrnuh K. Dahya
3. Lon G. Britton
4. Craig Storum

5. (The Trustee selected by the above four Trustees)

The above named Trustees individually accept their appointment as Trustees under this Declaration of Trust and Agreement and consent to act as Trustees hereunder until they or their successors are designated as provided in this Agreement, and they declare and agree that they will receive and hold the Trust Fund as Trustees by virtue of the terms, conditions and provisions of this Trust Agreement and for the purposes, uses and trusts and with the powers and duties herein set forth.

Section 3: These five (5) Trustees, as designated, shall sign this Trust Agreement and their signature shall constitute acceptance of office in agreement to act under and be subject to the terms and conditions of this Trust Agreement.

Section 4: Prior to the commencement of their duties, the Trustees shall select a Chairperson and a Secretary from the group of then existing Trustees and the Chairperson and Secretary shall serve a term of one (1) year or until a new Chairperson and Secretary is elected.

Section 5: In the event of the absence of the Chairperson and the Secretary from the meeting, the Trustees shall designate another Trustee as acting Chairperson and/or acting Secretary until his or her return.

Section 6: Term of Trustees:

- (1) The term of the Mayor of the City of Pontiac shall be identical to his or her term of office.
- (2) The term of the finance Director of the City Pontiao shall be identical to his term of holding the position of Finance Director.
- (3) The term of the Firefighter Trustee shall be identical to the term said Fighter serves as a Trustee of the Police and Fire Retirement System of the City of Pontiao.

- (4) The term of the Police Officer Trustee shall be identical to the term said Officer serves as a Trustee of the Police and Fire Retirement System of the City of Pontiac.
- (5) The term of the fifth Trustee shall be a three year term. The initial fifth Trustee shall serve until December 31, 1997. The fifth Trustee may be removed by unanimous vote of the first four Trustees, i.e. Mayor, Finance Director, Firefighter, and Police Officer.

Section 7: The fifth Trustee may resign at any time and be discharged from duties and liabilities under this Trust Agreement by giving at least thirty (30) days written notice to the remaining Trustees. A successor fifth Trustee shall be appointed by unanimous vote of the first four Trustees. Any successor Trustee appointed under the terms of this Agreement shall, upon appointment, and without further act, deed or conveyance, succeed to all the rights, duties, titles, and powers, of every type and description of his or her predecessor.

Section 8: Each Trustee shall serve until the expiration of his/her term of office or until his or her death, incapacity, resignation or removal.

Section 9: A vacancy or vacancies in the office of the Trustees shall not impair the powers of the remaining Trustees to administer the affairs of the Trust, provided there are sufficient Trustees to constitute a quorum as herein provided. Three (3) Trustees shall constitute a quorum.

Section 10: All decisions shall be made by at least three (3) affirmative votes.

Section 11: The Trustees shall meet at least once quarterly. The Trustees shall determine the time for the regular meetings of the Trustees and the place or places where such meetings shall be held. The Secretary of the Trustees or his designee, shall be responsible for giving notice of the time and place of such

meetings to the other Trustees. Special meetings of the Trustees may be held at the call of the Chairperson, the Secretary, or any two (2) Trustees upon five (5) days written notice to each Trustee. Special meetings of the Trustees may also be held at any time, without notice, if all Trustees consent in writing thereto. Notice of all meetings of the Trustees, both regular and special, shall be given to the City and to the collective bargaining associations.

ARTICLE V

Powers and Duties of the Trustees

Section 1: The Trustees shall hold all the powers of Trustees that are necessary to carry out the purposes of this Trust and are generally available to Trustees under the laws of the State of Michigan, except as limited by this Trust and by federal law. It is intended that this Trust shall be tax exempt and shall qualify under the Internal Revenue Code, particularly Section 501(c)(9), and any amendments of the Code applicable to plans of this type. The Trustees shall have the continuing power and duty to amend the Trust to the extent it becomes necessary to qualify said Trust under the Internal Revenue Code and to continue the tax exempt status of the Trust Fund. The Trustees shall take no action nor make any determination inconsistent with any qualification or ruling of the Internal Revenue Service, an arbitrator or the courts with respect to this Trust Fund. In the case of amendments to the Internal Revenue Code or changes of regulations by the Internal Revenue Service or the Labor Department, the Trustees are empowered to take all necessary action to continue the qualifications of this Plan as a qualified Plan and to continue its contributions to it as tax-free deductions. The Trustees are also authorized to take all necessary action to maintain the Plan in compliance with applicable federal law. The Trustees shall

have exclusive responsibility for the investment, management and control of Trust assets.

Section 2: ~~The Trustees shall carry out the purposes of this Trust Agreement and may maintain any health benefit programs and insurance policy or policies now in force and effect and available to Police and Fire Retirees of the City of Pontiac or may substitute other comparable or superior policies in lieu thereof.~~ In providing group life insurance to the Participants of this Plan so as to effectuate the purposes of this Trust Agreement, ~~the Trustees shall be bound by the terms of this Trust Agreement and any applicable Collective Bargaining Agreements~~ between the City and the collective bargaining associations and shall comply with all applicable laws.

Section 3: In carrying out the purposes of this Trust Agreement, ~~the Trustees may maintain group health and hospitalization, optical, and dental insurance policy or policies now in force and in effect during the time period that the Participant was an active employee or may substitute other comparable or superior policies in lieu thereof.~~ In providing group health and hospitalization benefits to the Participants of this Plan so as to effectuate the purposes of this Trust Agreement, the Trustees shall be bound by the terms of this Trust Agreement and the Collective Bargaining Agreements between the City and the collective bargaining associations and shall comply with all applicable laws. In addition to, or in lieu of, policies of insurance obtained through commercial or other companies, the Trustees may, consistent with the laws of the State of Michigan, adopt a self-insurance Trust Fund. The Trustees may arrange for a continuation of the present arrangements regarding the providing of benefit coverage by the employer through the employer's self-insured arrangement and all existing policies between the City and applicable insurance carriers.

Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of Participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the Collective Bargaining Agreement and the performance of all obligations provided in this Trust. The Trustees shall immediately notify the City, the collective bargaining associations, and the Administrator of a delinquency, mistake or discrepancy in any report or contribution. In a suit or action brought by the Trustees commenced pursuant to this Section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees. Delay by the Trustees in bringing this suit to recover delinquent contributions from the City shall not be considered a waiver of any of the rights reserved to the Trust.

Section 5: The Trustees, in accordance with the requirements of law, may, upon their own initiative or upon the City becoming delinquent, direct an impartial firm of independent certified public accountants to act as agent of the Trustees at any reasonable time during business hours, to enter upon the premises of the City which is a signatory to a Collective Bargaining Agreement requiring contributions to this Trust or is otherwise obligated to remit funds to the VBBA Trust and to examine only the payroll records, papers and reports pertaining thereto as may be necessary to determine the moneys due on behalf of a Participant covered by this Trust and to make a written report to the Trustees, with an identical copy to the City. This procedure is to insure that the Trustees can fully ascertain whether the City is making full payments to the Trust, as required by anyone or all of the Collective Bargaining Agreements, and any amendment thereto, court decisions or arbitration awards.

Reports required by this Section shall be confidential and released only to the Trustees and the City, except to the extent that disclosure would be otherwise required by law.

Section 6: Notice given to all parties shall, unless otherwise specified, be sufficient if in writing and delivered or sent by prepaid first class mail or prepaid telegram or mailgram. Except as otherwise noted, the distribution or delivery of any statements or documents required under this Agreement shall be sufficient if delivered in person or prepaid first class mail.

Section 7: (a) The Trustees shall maintain proper books of accounts and records of administration of the Trust, including written records of all meetings.

(b) The Trustees shall compile and furnish to each individual Trustee all records which they individually or collectively require to properly discharge their duties. The books of accounts and records of administration of the Trust, including the minutes of all meetings, shall be available for inspection at the permanent office of the Trust during reasonable business hours by the City, by the collective bargaining associations, or any Participant covered by this Agreement.

(c) The Trustees shall make available to the collective bargaining associations information relating to contributions from the City, pursuant to the respective Collective Bargaining Agreements and the status of coverage of their covered Participants.

(d) The City shall be entitled to receive from the Trustees records pertaining to their contributions and any Participant shall be entitled to receive records of the Trustees relating to the activities of the Trust.

Section 8: The Trustees shall cause an annual audit to be made of the Fund by a firm of independent certified public accountants, and copies of such audit

shall be furnished to the parties hereto and a copy shall be made available at the principal office of the Trust for inspection by interested persons. Such audit shall contain a summary of the assets and liabilities of the Plan, a resume of the operations for the preceding year, together with such other data as the Trustees request or is required by law.

Section 9: The Trustees shall make reports to and file such information with the Internal Revenue Service, or any other appropriate public authority as may be required by state or federal law.

Section 10: A written instrument signed by the trustees shall be evidence of the action of the Trustees. Whenever the signature of a Trustee is required on any document, signature of the Chairperson or acting Chairperson and Secretary or acting Secretary shall be required, unless such authority has been delegated to an individual Trustee pursuant to the provisions hereof; and as to any person doing business with the Trustees, any such instrument so signed shall be conclusively presumed to be authentic and all facts and matters stated therein shall be conclusively presumed to be true and said persons may rely on such instrument for all purposes.

Section 11: The Trustees may assign or allocate specific responsibilities or duties among the Trustees, or appoint committees for the purpose of overseeing any activity or pursuing or investigating any activity or transactions in which the Trustees are interested. The Trustee or committee of Trustees may be assigned the responsibility to take action without prior approval by the remainder of the Board. Any such action taken under such circumstances shall be valid, proper and not a breach of fiduciary responsibility of the Trustee or committee so appointed and so acting. The Trustees may rely on the report the individual Trustee or committee of Trustees who prepared the report or recommended the action which was undertaken by the full Board after receiving the report of the Trustee or committee

of Trustees. No Trustee shall be liable for the acts of any Trustee or committee of Trustees under these circumstances because of any act or omission on the part of the Trustee or committee of Trustees to whom such responsibilities, obligations or duties have been assigned or allocated, unless he/she participates with the knowledge that such act or omission is a breach of fiduciary responsibility or if he/she has knowledge of a breach by such other fiduciary without making reasonable efforts under the circumstances to remedy the breach.

Section 12: In the event of any suit brought against the Trustees arising out of the acts within the scope and powers and duties of the Trustees, or in the event of any lawsuit brought by the Trustees as authorized herein, the cost of the defense or prosecution of such lawsuit shall be charged to the Trust Fund, and shall be paid directly from the Trust Fund, provided such costs are not incurred by reason of bad faith, gross negligence, or breach of a fiduciary obligation to the Trust Fund or to the beneficiaries thereof.

Section 13: All income, profits, recoveries, contributions, forfeitures, and any and all moneys, securities and properties of any kind at any time received or held by the Trustees hereunder, shall become part of this Trust Fund when received, and shall be held for the uses and purposes hereof.

Section 14: The Trust Fund may cause the Trustees, or any person, firm, or organization with which it deals who has fiduciary responsibilities under this Trust Agreement or under that person's, firm's, or organization's arrangement with the Board of Trustees, to be bonded in an amount not less than ten percent (10%) of the funds handled, but in no event in excess of five hundred thousand dollars (\$500,000.00), unless an amount over and above that is prescribed by state or federal law. The corporation providing such bond shall meet applicable federal, state, and local standards. The cost of said bond shall be borne by the Trust Fund.

Section 15: The Trustees may authorize the purchase of insurance for the Trust Fund and for the Trustees to cover liability or losses occurring by reason of an act or omission (errors or omissions) of a fiduciary, including the Trustees, providing, however, that such insurance policy permits recourse by the insured against the fiduciary, including the Trustee or Trustees involved; in case of breach of fiduciary obligation by such fiduciary.

Section 16: The Trustees may employ such clerical personnel or administrative personnel to perform whatever administrative activities are required in the proper performance of the Trust. In addition thereto, the Trustees may, if they desire, contract with an administrator to perform such clerical and administrative duties as they may, in their discretion, determine is reasonable and prudently necessary to carry out the Trust Fund's activities and purposes. The administrator so appointed, or with whom the contract was made, may be assigned the activities of receiving the City's reports, entering the information of those reports on permanent records, maintaining such records, receiving contributions from the City and/or on behalf of Participants in the form of checks or drafts solely for the purpose of forwarding the contributions to the Trustees' bank accounts, preparation of governmental reports, furnishing reports required by law to Participants, the preparation of checks for the payment of obligations of the Trustees, and all related activities and other activities necessary to help administer the Trust Fund. The Trustees are further authorized to enter into contracts with such administrator for the administration of said Plan or Plans and Trust Fund for whatever periods, in their discretion, the said Trustees deem advisable. The Trustees shall be entitled to rely on the reports and recommendations of said administrator or any actions taken by said administrator with the authority granted him/her. The Trustees shall be responsible for any act taken with respect to the appointment, designation, retention, discharge, or employment of such

administrator which is taken prudently and in good faith. Under no circumstances shall said administrator have control or authority with respect to the management of the Plan of Plans or its assets. The said administrator shall not be clothed with any type of authority or power which will constitute the administrator and a fiduciary with an administrator to perform such clerical and administrative duties as they may, in their discretion, determine is reasonable and prudently necessary to carry out the Trust Fund's activities and purposes. The administrator so appointed, or with whom the contract was made, may be assigned the activities of receiving the City's reports, entering the information of those reports on permanent record, maintaining such records, receiving contributions from the City and/or on behalf of Participants in the form of checks or drafts solely for the purpose of forwarding the contributions to the Trustees' bank accounts, preparation of governmental reports, furnishing reports required by law to Participants, the preparation of checks for the payment of obligations of the Trustees, and all related activities and other activities necessary to help administer the Trust Fund. The Trustees are further authorized to enter into contracts with such administrator for the administration of said Plan or Plans and Trust Fund for whatever periods, in their discretion, the said Trustees deem advisable. The Trustees shall be entitled to rely on the reports and recommendations of said administrator or any actions taken by said administrator with the authority granted him/her. The Trustees shall not be responsible for any act taken with respect to the appointment, designation, retention, discharge, or reemployment of such administrator which is taken prudently and in good faith. Under no circumstances shall said administrator have control or authority with respect to the management of the Plan or Plans or its assets. The said administrator shall be clothed with any type of authority or power which will constitute the administrator as a fiduciary. Said administrator will not have the power or authority to act as an investment counselor or manager and will not be

authorized to furnish investment advice. The administrator will not be clothed with the discretion to act in any way with respect to the Plans or management or its assets. In the event of the administrator's discharge, the Trustees shall require the said administrator to return all necessary books, records, and documents in the possession of said administrator which are necessary for the proper administration, handling, and operation of this Trust. If the Trustees have appointed, employed, hired, or contracted with an administrator, a provision to this effect shall be incorporated in the written agreement between the Trustees and administrator. The Trustees may, in their discretion, assign certain administrative duties to the City; provided, however, that the direction and management of such activities shall be within the exclusive control of the Trustees.

Section 17: The Trustees shall employ an independent certified public accountant or licensed public accountant who is not providing services to either the employer or any of the collective bargaining associations. Said accountant shall be employed to perform the services as may be required by the Trustees. The Trustees shall cause the Fund to be audited at least once each year.

Section 18: The Trustees shall be authorized to appoint (an) investment manager(s) to manage the assets of the Plan. Such investment manager(s) must be registered under the Investment Advisor's Act of 1940 and must meet any applicable state and federal requirements to act as investment manager. Such appointment may include the power to acquire and dispose of the assets of the Plan; provided, however, that if any state or federal agency promulgates any rules with respect to limitation of liability on the part of the Trustees in choosing an investment manager or counselor, then the Trustees shall follow said regulations to the extent that they can maximize the protection available to them.

Section 19: If the Trustees choose an investment manager or investment counselor, they may enter into a written agreement with said investment manager.

or investment counselor or bank or insurance company, if such institutions act in such capacity, which will provide for the investment or reinvestment of the assets of the Trust Fund; and upon such execution, the Trustees may convey, if it is so provided, to such investment manager, investment counselor, bank or insurance company, any assets of the Trust Fund so that said investment manager or counselor may engage in such transactions which are legal for trust funds in the State of Michigan and in the United States and which are prudent for the Trustees to undertake. The Trustees shall not be liable for the acts or omissions of such investment manager, investment counselor, bank or insurance company or under any obligation to invest or otherwise manage the assets of a Plan or Plans, which assets are subject to the management of such investment manager, investment counselor, bank or insurance company.

The Trustees may, if they deem proper in their discretion, or if the circumstances require it, appoint such investment manager, managers, banks or insurance companies as fiduciaries and enter into an agreement with such institution, naming it a fiduciary and conveying to such fiduciary all or a portion of the assets of the Trust Fund, so that said fiduciary may handle, manage and hold those assets conveyed to it. All assets conveyed to said fiduciary shall be subject to the provision of the agreement or agreements between the Trustees and the fiduciary.

Section 20: The Trustees may employ legal counsel with whom they may seek advice, consult with, require attendance at Trustees meeting and to represent the Trustees whenever necessary, including the preparation of any documents, legal or otherwise, which may have any legal consequences. In choosing said counsel, the Trustees may, with prudence, give consideration to the developed skills and expertise of the attorney and experience and reputation he/she has achieved.

The Trustees may rely upon the opinion of such counsel so chosen in respect to any action taken or suffered by the Trustees hereunder in good faith, in accordance with the opinion of said counsel, and the Trustees shall not be liable therefore.

ARTICLE VI

Trustee Compensation

The Trustee shall not receive any compensation for performing any services for the Trust. Each Trustee shall be reimbursed for any expenses properly and actually incurred in the performance of his/her duties to the Trust. Included in such reasonable expenses properly and actually incurred in the performance of services to this Trust is the attendance at educational meetings and seminars organized and designed to instruct the Trustees in the proper performance of their duties as Trustees and fiduciaries and to instruct, familiarize and acquaint the Trustees with all the provisions of all applicable laws. Included in such reasonable costs and expenses will be per diem allowance, costs and travel expenses, lodging and food expenses and other reasonable and necessary expenses involved in the participation of such educational conferences conducted and carried out for the purposes expressed herein. The Trustees may further authorize any of the experts who they may retain, including administrators, insurance experts, actuaries, auditors, accountants, attorneys or others, to attend such educational conferences for the purpose of becoming informed of any new developments or for the purpose of keeping current as to the developments in their proper area of expertise. The Trustees are authorized to pay such persons the cost of attending such meetings and/or compensation as the person would ordinarily earn representing the Trustees and familiarizing themselves with the developments in their area of expertise for the purpose of properly serving the Board of Trustees. Any Trustee who is

actively employed as a Police Officer or Firefighter for the City shall be permitted attendance at any and all functions of the Trust, including travel to educational programs and seminars without loss of pay, benefits, or status.

ARTICLE VII

Liabilities of the Parties

Section 1: The City shall not be liable for payment to the Trust of any amounts other than those required of it by this Trust Agreement or any applicable Collectible Bargaining Agreement. The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, except as provided by the terms of the Collective Bargaining Agreements between the collective bargaining association and the City and the terms of this Trust Agreement. Neither the collective bargaining associations, the City, nor any Participant or Trustee shall be liable for any debts, liabilities, or obligations of the Trust except as set forth in the Collective Bargaining Agreements or this Trust Agreement. Neither the City nor any Participant shall have any right to return of any money properly paid into the Trust Fund, except as otherwise specifically provided herein, or to money improperly paid which has already been invested or distributed. Any contribution improperly paid into the Trust Fund by the City or on behalf of a Participant shall be returned by the Trustees upon the request of the City or the Participant or upon discovery by the Trustees that such moneys have been improperly paid into the Trust Fund, unless those moneys have already been invested or distributed.

Section 2: No part of the Fund or any benefits payable by the Trustees shall be subject to alienation, sale, transfer, assignment, pledge, or encumbrance charge by any person. No Participant shall be entitled to receive any part of the contributions made by the City or required to be made by the Trust, in lieu of such

benefits provided under the Plan as determined by the Trustees in accordance with this Agreement.

ARTICLE VIII

Claims Procedure

The Trustees shall provide adequate notice to any Participant or beneficiary whose claims for benefits under this Plan have been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the Participant. Further, the Trustees shall afford a reasonable opportunity to any Participant whose claim for benefits has been denied for a full and fair review of the decision denying the claim. The Trustees shall have the authority to promulgate rules setting forth the precise conduct of any such claims procedure.

ARTICLE IX

Termination of the Trust

Section 1: Subject to the Limitations herein, the parties hereby contemplate that new Collective Bargaining Agreements may be entered into from time to time continuing the provisions for the City and Participant contributions to this Trust Fund. This Trust shall continue during such period of time as may be necessary to carry out the provisions of the Collective Bargaining Agreement requiring payment to the Trust and the fact that such Collective Bargaining Agreements are not extended shall not by itself terminate this Trust, which shall continue for a period of time sufficient to wind up the affairs of the Trust.

Section 2: Provided there are no longer any Participants eligible for benefits from the Trust Fund, this Trust may be terminated at any time by the Trustees or their successors in office who are signatories hereto by the execution of an instrument in writing, so long as the termination is not inconsistent with the

then existing Collective Bargaining Agreement. It shall not be necessary for the City or the collective bargaining associations to execute such an agreement for the Trust to terminate.

Section 3: This Trust shall terminate in any case upon the death of the last survivor of such persons who are living at the time of its creation or entitled to receive benefits hereunder, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, this Trust may continue in perpetuity, unless otherwise terminated.

Section 4: If this Trust shall terminate, the Trustees shall forthwith notify any insurance carrier or carriers then providing insurance to Participants in the Fund.

Section 5: In the event of the termination of this Trust, the remaining funds available after providing for all the outstanding obligations, shall be used in a manner as will, in the opinion of the Trustees, best effectuate the purposes of this Trust, including, but not limited to, the purchase of insurance benefits.

ARTICLE X

Amendments

Section 1: The provisions of this Declaration of Trust and Agreement may be amended at any time, by (A) collective bargaining between the collective bargaining associations identified in Article 1, Section 8 and the City of Pontiac (B) by a unanimous vote of the five (5) Trustees, concurred in by the City Council of the City of Pontiac provided, however, that such Amendments are not inconsistent with any applicable Collective Bargaining Agreements and do not adversely affect the tax exempt status of the 501(c)9 Trust. Except as otherwise provided in this Trust Agreement, the Trustees shall have no power in amending

the provision of this Trust Agreement with respect to the amount of contributions required of the City.

Section 2: In addition, the Trustees shall not have the power to adopt any Amendments to this Trust Agreement which:

- (a) alters the basic purposes of this Trust, as set forth herein or divests any Participant or beneficiary of any rights which have already vested and to which they have already become entitled to and for sums of money which they are entitled to receive then or in the future; or
- (b) conflicts with any applicable law or government regulation; or
- (c) causes the use or diversion of any part of the Fund for purposes other than those generally authorized herein,
- (d) with respect to applicable Collective Bargaining Agreement, conflicts with any applicable Collective Bargaining Agreements.

Section 3: Despite any provision to the contrary above, or which may be inconsistent herewith, the Trustees may amend and shall have the duty to amend this Agreement to comply with any rule or regulation of the Internal Revenue Service for qualification under the Internal Revenue Code, continuation of tax exemptions of the Trust and for the deductibility of contributions made by the City under applicable Sections of the Internal Revenue Code or to obtain a favorable determination letter from the Internal Revenue Service. In the event any Amendment is made, a copy of such Amendment bearing requisite signatures of the Trustees, shall be sent to all parties in interest to the Trust Fund as that term is defined by law.

ARTICLE XI

Rule Making Powers

Consistent with the terms of the provisions of state and federal law, the Trustees shall have the power to promulgate rules and regulations for the day to day management of the Trust, the investment of moneys held by the Trust, the establishment of eligibility and benefit levels, to determine all questions regarding the interpretation of the Trust, and such other subjects as shall be deemed necessary and proper by the Trustees. All such rules and regulations shall be reduced to writing and shall be kept in the permanent office of the Trust and available for inspection by the City, the collective bargaining associations and the Participants. Any such rule or regulation promulgated by the Trustees shall be adopted, repealed, or amended by an affirmative vote of four (4) of the Trustees. If any rule or regulation of the Trust is found to be in conflict with any Collective Bargaining Agreement, law, statute, judicial decision, arbitration decision, or any other competent body or tribunal, such rule or regulation shall be deemed voided and, all other rules and regulations of the Trust shall remain in full force and effect. The City, the collective bargaining associations, and the Participants shall be given appropriate notice of all pending rule making meetings and all such parties shall be afforded an opportunity to be heard at said meetings.

ARTICLE XII

Execution

This Agreement and Declaration of Trust shall become effective as of the date it is executed.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be signed and/or executed by duly authorized officers in the City of Pontiac, Michigan and the Trustees, as of the day and year first above written.

Signed, sealed and delivered CITY OF PONTIAC, MICHIGAN in the presence
of:

Pamela Hopkins 1/30/97
RETIREMENT SYSTEMS COORDINATOR

By: Walter Moore
Mayor
By: H. K. Dahya
Finance Director

TRUSTEES:

Walter Moore
H. K. Dahya
Craig L. Storum

1. WALTER MOORE
2. LON G. BRITTON
3. HASMUKH K. DAHYA
4. CRAIG STORUM
5. _____

EXHIBIT F

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREMENT SYSTEM,
and BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREE PREFUNDED
GROUP HEALTH AND INSURANCE TRUST,

Plaintiffs,

Case No. 12- 128625 -CZ
Hon. JUDGE DP O'BRIEN

vs.

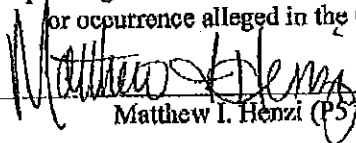
CITY OF PONTIAC, MICHIGAN,

Defendant.

Anthony A. Asher (P10273)
Matthew I. Henzi (P57334)
Sullivan, Ward, Asher & Patton, P.C.
Attorneys for Plaintiffs
1000 Maccabees Center
25800 Northwestern Highway
Southfield, Michigan 48075-8412
Telephone: (248) 746-0700
Facsimile: (248) 746-2760
Email: mhenzi@swappc.com

COMPLAINT

There is no other pending or resolved civil action arising out of the transaction
or occurrence alleged in the Complaint.


Matthew I. Henzi (P57334)

NOW COME Plaintiffs, by and through their attorneys, Sullivan, Ward, Asher &
Patton, P.C., and for their Complaint against Defendant, state as follows:

VENUE AND JURISDICTION

1. Defendant, City of Pontiac, Michigan (the "City"), is a municipal entity, incorporated under the Home Rule City Act, MCL 117.1 *et. seq.*, located in Oakland County, Michigan and is organized under the Home Rule City Act, MCL 117.1 *et seq.*

2. The City sponsors the City of Pontiac Police and Fire Retirement System ("PFRS"), an ordinance based governmental defined benefit retirement plan, recognized by the Internal Revenue Code as a qualified trust under IRC section 401(a). PFRS provides retirement benefits for all police and fire employees of the City. The PFRS is located in Pontiac, Michigan.

3. The PFRS is administered by a five-member Board of Trustees, as specified by City Ordinance. The Board of Trustees delegates routine administrative matters to its Retirement System Administrator and her staff comprised of 3 individuals.

4. The City has also established by ordinance The City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust (the "Trust") to provide health, optical, dental, and life insurance benefits for retirees who are members of the PFRS and who retired from the City on or after August 22, 1996. The Trust was created as an Internal Revenue Code 501(c)(9) as a (VEBA). The Trust is located in Pontiac, Michigan.

5. The Trust is administered by a five-member Board of Trustees, as specified by City Ordinance.

6. Venue is appropriate in Oakland County pursuant to MCL 600.1615.

7. The amount in controversy exceeds \$25,000.00, exclusive of costs, interest, and attorney fees.

FACTUAL ALLEGATIONS - PFRS

8. The PFRS is a governmental plan under Internal Revenue Code 414 and was established by ordinance, as last amended in 2007 and as codified on the City's website as Chapter 92 of the City's Ordinance Code.

9. The PFRS is governed by the State of Michigan's constitution, *Const. 1963, Art. 9, §24*, which provides that:

The accrued financial benefits of each pension plan and retirement system of a state in its political subdivision shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits, annual funding.

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

10. Under this section of the constitution, the People of the State of Michigan have imposed a duty upon the City to fund, during any fiscal year, financial benefits arising under the PFRS on account of services rendered in that year.

11. The PFRS is also governed by Public Act 314, the Public Employee Retirement System Investment Act, MCL 38.1132 et. seq. ("PA 314")

12. The PFRS System is a trust fund, separate and distinct from the City, and the assets of the System shall be for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the System. MCL 38.1133(6).

13. Section MCL 38.1140(m) of PA 314 requires the City to annually contribute the "actuarially determined contribution amount." The contribution amount is defined as follows:

... the required employer contribution is the actuarially determined contribution amount. An annual required employer contribution in a plan under this Act shall consist of a current

service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability. (Emphases added).

14. According to MCL 38.1140(m), the trustees of the PFRS have the sole responsibility and authority in hiring an actuary and determining the required employer contribution that the City must make annually.

15. In addition to the funding requirements of the Michigan Constitution and PA 314, the PFRS Ordinance requires member contributions, the amount of which is determined by collective bargaining between the members' unions and the City and City contributions in an amount which will be sufficient to provide for the benefits earned during the year of service. The Ordinance further requires the City to contribute those costs as determined necessary according to an actuarial valuation. See Section 92-114 of the Ordinance.

16. On October 19, 2010, Sandra W. Rodwan, EA, MAAA, FCA, President of Rodwan Consulting Company ("Rodwan"), the actuarial consulting firm for the PFRS, prepared the Annual Actuarial Valuation for the PFRS as of December 31, 2009. The actuarial report is not attached since it is in the possession of the City and its attorneys.

17. The purpose of the actuarial valuation was to:

- A. compute the liabilities associated with benefits likely to be paid on behalf of current, retired, active, vested, inactive members of the Retirement System;
- B. Compare accrued assets with accrued liabilities to assess the funded condition of the Retirement System, and
- C. Compute the City's required contribution rate for the fiscal year beginning July 1, 2011.

18. The actuary, using actuarial assumptions previously approved by the Board of Trustees and the actuary, computed the City's required contribution for the fiscal year beginning on July 1, 2011 to be \$1,527,193.00, or 20.62% of valuation payroll.

19. The Actuarial Valuation assumes that the City's required contribution will be paid to PFRS in two semi-annual payments, the first in December and the second in June. The contribution, when calculated by the actuary, is reduced to account for the anticipated interest that the December payment will accrue during the six month period prior to the end of the fiscal year. Because the City failed to make any contributions for fiscal year July 1, 2011 - June 30, 2012, the City's required contribution must be increased by a percentage determined by the actuary for each day the payment is received after its due date to account for lost interest.

20. The City is currently in receivership under Michigan Public Act 4 of 2011. As such, the State has appointed an Emergency Manager to control the finances of the City.

21. The Trustees of the PFRS are fiduciaries, pursuant to statute, ordinance, and bylaws and are to discharge their fiduciary duty solely in the interest of the participants and the beneficiaries of the PFRS.

22. The Trustees of the PFRS have a statutory duty, pursuant to MCL 38.1140(m), to confirm that the City paid its required employer contribution according to statute.

23. On July 9, 2012, Plaintiffs, through their counsel, sent written demand to the Emergency Manager, through his counsel, for payment of all required City contributions for the PFRS and the Trust. The total due from the City to PFRS is \$1,333,070.30. This amount was calculated based the percentage of actual payroll, for police and fire employees for the month of July 2011. From August 1, 2011-December 31, 2011, this amount was calculated based on the percentage of actual payroll of fire employees, only. From January 1, 2012-June 30, 2012,

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the amount calculated was based on a pro rata share of the hard dollar figure calculated by the actuary, stated in paragraph 18, above.

24. The City did not respond to the request. Further, the City's Emergency Manager has published statements indicating the city will not pay these contributions. As such, Plaintiffs file this lawsuit to compel the City's employer contribution to the PFRS for all applicable periods.

FACTUAL ALLEGATIONS - THE TRUST

25. The Trust was created on August 22, 1996. The settlors to the Trust include the City and the Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Plan. A copy of the Trust is not attached to this Complaint since it is in the possession of the City and its attorneys.

26. The Trustees of the Trust are fiduciaries and are required to discharge their fiduciary duty in the sole interest of the participants and beneficiaries of the Trust.

27. The Trust requires the City to make certain contributions to the Trust, as follows:

Section 3: Contributions - The term "contributions" as used herein, shall be mean the payment required to be made to the trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing collective bargaining agreements or any future collective bargaining agreements for the purpose of providing group health hospitalization and dental and optical and group life insurance for employees, retirees, and beneficiaries covered by the Plan.

Pages 2-3 of Trust.

28. The Trust permits the Trustees to compel and enforce payment of payments of contributions and that time is of the essence as to all payments to the Trust, as follows:

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Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this trust fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the trust and the providing of benefits under various insurance programs.

Pages 7-8 of Trust.

29. The Trust obligates the City to pay the Trust's attorneys' fees for the instant suit, as follows:

Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the collective bargaining agreement and the performance of all obligations provided in this Trust. ...in a suit or action brought by the Trustees commenced pursuant to this section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees.

30. The City intended that the benefits provided by the Trust would be constitutionally protected, as follows:

Article 2. Establishment of Trust, Section 1:

The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan establishing in accordance with the terms of the Trust Fund. The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution.

(Emphasis added. Page 5 of Trust.)

31. The Trust exists for the exclusive purpose of providing through policies issued by duly licensed commercial insurance companies, through a fund of self-insurance or through

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any other lawful means of providing insurance, group health and hospitalization, dental and optical insurance in accordance with collective bargaining agreements between the City and applicable Police and Fire Collective Bargaining Associations, for the benefit of their Police and Fire retirants and beneficiaries who are eligible to participate in accordance with the Plan.

32. The City is required to pay to the Trust Fund "such amounts as the trustees may determine are actuarially certified and are actuarially necessary to fund the trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the actuary for the Trust to result in a pre-funded plan. Page 6-7 of Trust.

33. On June 8, 2011, Sandra Rodwan, EA, MAA, FCA, President of Rodwan Consulting Company ("Rodwan"), the actuarial consulting firm for the Trust prepared the annual actuarial valuation for the Trust as of December 31, 2009. The actuarial report is not attached since it is in the possession of the City and its attorneys.

34. The actuary, using actuarial assumptions previously approved by the Board of Trustees in the actuary, computed the City's required contribution for the fiscal year beginning on July 1, 2011 to be \$4,381,269.00, or 44.65% of valuation payroll.

35. On July 9, 2012, the Trustees of the Trust sent written demand to the Emergency Manager, through his attorney, for payment of the City's required contributions for the PFRS and the Trust. The total due from the City to the Trust is \$3,473,923.28. This amount was calculated based on the percentage of actual payroll, using the percentage rate calculated by the actuary. The amount was calculated in July 2011 based on actual payroll of fire and police employees during July 2011. From August 1, 2011-December 31, 2011, the amount was based on actual payroll of fire employees, only, because there were no police employees. From

January 1, 2012 through June 30, 2012, the amount was calculated based on a pro rata share of the hard dollar figure calculated by the actuary, stated in paragraph 34, above.

36. The City did not respond to the request. Further, the City's Emergency Manager has published statements indicating the city will not pay these contributions. As such, Plaintiffs file this lawsuit to compel the City's employer contribution to the Trust for all applicable periods.

COUNT I - VIOLATION OF MICHIGAN CONSTITUTION - PFRS

37. Any accrued financial benefits of a public retirement system pension plan are, by Constitutional mandate through Const. 1963, Article 9, §24, a contractual obligation which cannot be diminished or impaired.

38. This section of the Constitution also requires that benefits arising on account of service rendered in each year be funded during that year.

39. The Trustees of the PFRS have the sole authority to calculate the City's pension contribution.

40. The City has failed to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012. Further, the City has indicated that it does not intend to make this contribution.

41. The City's failure to pay its employer contribution to the PFRS is a violation of Article 9, §24 of Michigan's Constitution.

42. This court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

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43. An actual controversy exists between Plaintiffs and Defendant that can only be determined by an adjudication in the nature of a declaratory judgment as provided by law and court rule.

44. The City's violation of Constitution's 1963 Article 9, §24 is a failure to honor its contractual obligation, which cannot be diminished or impaired by the City.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated Article 9, §24 of the Michigan Constitution of 1963 by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT II - VIOLATION OF MICHIGAN CONSTITUTION - THE TRUST

45. By entering into the Trust, the City expressly indicated its intent that benefits provided under the Trust were statutorily mandated and that the City had a contractual obligation to pay its contribution on an annual basis to the Trust and that this obligation could not be diminished or impaired by the actions of its officials or governing body.

46. Any accrued financial benefits of a public retirement system pension plan are, by Constitutional mandate through Const. 1963, Article 9, §24, a contractual obligation which cannot be diminished or impaired.

47. This section of the Constitution also requires that benefits arising on account of service rendered in each year be funded during that year.

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48. The Trustees of Trust have the sole authority to calculate the City's pension contribution.

49. The City has failed to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012. Further, the City has indicated that it does not intend to make this contribution.

50. The City's failure to pay its employer contribution to the Trust is a violation of Article 9, §24 of Michigan's Constitution.

51. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

52. An actual controversy exists between Plaintiffs and Defendant that can only be determined by an adjudication in the nature of a declaratory judgment as provided by law and court rule.

53. The City's violation of Constitution's 1963 Article 9, §24 is a failure to honor its contractual obligation, which cannot be diminished or impaired by the City.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated Article 9, §24 of the Michigan Constitution of 1963 by failing to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

**COUNT III - VIOLATION OF PUBLIC EMPLOYEE RETIREMENT SYSTEM
INVESTMENT ACT, MCL 38.1132 ET. SEQ., PA 314 - PFRS**

54. MCL 38.1140(m) required the City to make its annual contribution to the PFRS and that the contributions shall consist of the current service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability.

55. The Trustees of the PFRS have the sole responsibility and authority to determine the City's annual contribution.

56. The City's failure to pay its annual contribution for fiscal year July 1, 2011 - June 30, 2012 is a violation of the above-cited statute.

57. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

58. An actual controversy exists between Plaintiffs and Defendant that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated the Public Employee Retirement System Investment Act, MCL 38.1132 et. seq., Public Act 314, by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT IV- VIOLATION OF ORDINANCE AND BREACH OF TRUST - THE TRUST

59. The City created a Trust Agreement and adopted it as an ordinance, and therefore became obligated to make annual contributions for certain health care benefits for eligible participants according to the terms of the Trust/Ordinance.

60. The terms of the Trust/Ordinance indicate that the City intended the benefits to be constitutionally mandated and that the obligation for the City to make its contribution could not be diminished or impaired.

61. The City has failed to timely make its contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012 and has further indicated that it will not make this contribution.

62. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

63. An actual controversy exists between Plaintiffs and Defendant that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated its Ordinance by failing to pay its annual contribution to the Trust for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT V - VIOLATION OF ORDINANCE AND BREACH OF TRUST- PFRS

64. The City created a Trust which was adopted pursuant to the PFRS Retirement Ordinance, codified within Chapter 92 of the City's Ordinance Code. As such, the City is required to make annual contributions to the PFRS.

65. The City has failed to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012 and has indicated that it will not make the contribution.

66. This Court has the power under Rule 2.605(a)(1) of the Michigan Court Rules to "declare the rights and other legal relations of an interested party seeking a declaratory judgment whether or not other relief is or could be sought or granted."

67. An actual controversy exists between Plaintiffs and Defendants that can only be determined by adjudication in the nature of a declaratory judgment as provided by law and court rule.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Declare that Defendant has violated the PFRS Retirement Ordinance, codified within Chapter 92 of the City's Ordinance Code by failing to pay its annual contribution to the PFRS for fiscal year July 1, 2011 - June 30, 2012; and
- B. Enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to, together with costs, interest, and attorneys' fees; and
- C. Grant Plaintiffs such other and further relief as this Court determines to be fair, just, and equitable under the circumstances.

COUNT VI - BREACH OF CONTRACT - TRUST AND PFRS

68. The City has failed to pay its annual required contributions to the Trust and the PFRS in violation of its obligations pursuant to contract with Plaintiffs.

69. Based on the above-described omissions and breaches of the contract between the parties, the City has caused Plaintiffs to suffer substantial and irreparable damage.

70. Pursuant to contract between the parties, the City is required to pay its annual contributions to the PFRS and the Trust.


71. The City has breached the terms and conditions of its contract thereby causing irreparable damage to Plaintiffs.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter Judgment against the City of Pontiac, Michigan for such amount as Plaintiffs are found to be entitled to together with costs, interest, and attorneys' fees.

Respectfully submitted,

SULLIVAN, WARD,
ASHER & PATTON, P.C.

By:


MATTHEW I. HENZI (P57334)
Attorney for Plaintiffs
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075-8412
(248) 746-0700

Dated: August 8, 2012
W11818664/PPF/115999

SULLIVAN, WARD, ASHER & PATTON, P.C.

This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

Approved, SCAG

Original - Court
1st copy - Defendant2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO. 2012-128625-CZ JUDGE DP O'BRIEN
--	-----------------------	--

Court address

1200 N. Telegraph, Pontiac MI 48341

Court telephone no.

248-858-1000

Plaintiff's name(s), address(es) and telephone no(s).

Board of Trustees of the City of Pontiac Police and Fire Retirement System, and Board of Trustees of the City of Pontiac Police & Fire Retiree Prefunded Group Health and Insurance Trust

v

Defendant's name(s), address(es), and telephone no(s).

City of Pontiac, Michigan

Plaintiff's attorney, bar no., address, and telephone no.

Anthony A. Asher (P10273)/Matthew I. Henzi (P57334)
Sullivan, Ward, Asher & Patton, PC
25800 Northwestern Highway - Suite 1000
Southfield MI 48075 (248)746-0700

SUMMONS

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. YOU HAVE 21 DAYS after receiving this summons to file an answer with the court and serve a copy on the other party or take other lawful action with the court (28 days if you were served by mail or you were served outside this state). (MCR 2.111(C))
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint. This case has been designated as an eFiling case. To review a copy of the Notice of Mandatory eFiling visit www.oakgov.com/clerkrod/efiling.

Issued

AUG 08 2012

This summons expires

NOV 07 2012

Court clerk

Bill Bullard Jr.

*This summons is invalid unless served on or before its expiration date.

This document must be sealed by the seal of the court.

COMPLAINT

Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.

Family Division Cases

- ☐ There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.
- ☐ An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
------------	-------	---------

General Civil Cases

- ☒ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- ☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.
------------	-------	---------

VENUE

Plaintiff(s) residence (include city, township, or village)

Pontiac Michigan

Defendant(s) residence (include city, township, or village)

Pontiac, Michigan

Place where action arose or business conducted

Pontiac Michigan

August 8, 2012

Date

Signature of attorney/plaintiff

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you to fully participate in court proceedings, please contact the court immediately to make arrangements.

MC 01 (3/08) SUMMONS AND COMPLAINT

MCR 2.102(B)(1), MCR 2.104, MCR 2.105, MCR 2.107, MCR 2.113(C)(2)(a),(b), MCR 3.208(A)

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PROOF OF SERVICE**SUMMONS AND COMPLAINT**

Case No. _____

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE☐ **OFFICER CERTIFICATE**

OR

☐ **AFFIDAVIT OF PROCESS SERVER**

I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.101(A)(2)), and that: (notarization not required)

Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notarization required)

- ☐ I served personally a copy of the summons and complaint,
☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint,
 together with _____

List all documents served with the Summons and Complaint

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

- ☐ I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complete address(es) of service	Day, date, time

I declare that the statements above are true to the best of my information, knowledge, and belief.

Service fee	Miles traveled	Mileage fee	Total fee
\$		\$	\$

Signature _____

Name (type or print) _____

Title _____

Subscribed and sworn to before me on _____, _____ County, Michigan.
 Date

My commission expires: _____ Signature: _____
 Date Deputy court clerk/Notary public

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____

Attachments

on _____

Day, date, time

on behalf of _____

Signature _____

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EXHIBIT G

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**

BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREE PREFUNDED
GROUP HEALTH AND INSURANCE TRUST,

Plaintiff,

dg
Case No. 12-128625-CZ
Hon. Daniel P. O'Brien

vs.

CITY OF PONTIAC, MICHIGAN,

Defendant.

Anthony A. Asher (P10273)
Matthew I. Henzi (P57334)
SULLIVAN, WARD, ASHER & PATTON, P.C.
Attorneys for Plaintiff
1000 Maccabees Center
25800 Northwestern Highway
Southfield, Michigan 48075-8412
Telephone: 248.746.0700
Facsimile: 248.746.2760
Email: mhenzi@swappc.com

John C. Clark (P51356)
Stephen J. Hitchcock (P15005)
GAMARCO, MULLINS & HORTON, PC
Attorneys for Defendant
101 W. Big Beaver Road - 10th Floor
Troy MI 48084
Telephone: 248.457.7000
Facsimile: 248.457.7001
Email: jclark@gmhlaw.com
sjh@gmhlaw.com

**PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION AND PLAINTIFF'S REQUEST FOR
SUMMARY DISPOSITION PURSUANT TO MCR 2.116(I)(2)**

NOW COMES PLAINTIFF by and through its attorneys SULLIVAN WARD ASHER &
PATTON, P.C. and requests that this Honorable Court Deny Defendant's Motion for Summary
Disposition; further, that this Honorable Court grant Plaintiff's Request for Summary

SULLIVAN, WARD, ASHER & PATTON, P.C.

Disposition pursuant to MCR 2.116(I)(2).

Respectfully Submitted,

SULLIVAN, WARD, ASHER & PATTON, P.C.

By: /s/ Matthew I. Henzi
Attorney for Plaintiff
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075-1000
(248) 746-0700

Dated: April 10, 2013

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SULLIVAN, WARD, ASHER & PATTON, P.C.

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BOARD OF TRUSTEES OF THE CITY OF PONTIAC
POLICE AND FIRE RETIREE PREFUNDED
GROUP HEALTH AND INSURANCE TRUST,

Plaintiff,

Case No. 12-128625-CZ
Hon. Daniel P. O'Brien

vs.

CITY OF PONTIAC, MICHIGAN,

Defendant.

SULLIVAN, WARD, ASHER & PATTON, P.C.

Anthony A. Asher (P10273)
Matthew I. Henzi (P57334)
SULLIVAN, WARD, ASHER & PATTON, P.C.
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Southfield, Michigan 48075-8412
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John C. Clark (P51356)
Stephen J. Hitchcock (P15005)
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Telephone: 248.457.7000
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Email: jclark@gmhlaw.com
sjh@gmhlaw.com

**PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND PLAINTIFF'S
REQUEST FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(I)(2)**

INTRODUCTION

Pontiac owes Plaintiff Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") the sum of 3,473,923.28, plus interest. These amounts owed represent the unpaid balance of Pontiac's required, annual contribution payable to Plaintiff for fiscal year July 1, 2011-June 30, 2012.

Pontiac has paid its annual contribution to Plaintiff for decades, in response to Plaintiff's annual, actuarial valuation report. However, Pontiac failed to pay its annual contribution for fiscal year 2012. This amount was due on or before June 30, 2012. As such, Judgment should enter for Plaintiff.

STATEMENT OF FACTS

A. The Pleadings.

On August 8, 2012, Plaintiff filed its Complaint against Defendant City of Pontiac ("Pontiac").

The Complaint seeks to compel the City to pay \$3,473,923.28 to Plaintiff Police and Fire Retiree Prefunded Group Health and Insurance Trust, ("PF VEBA"). This sum represents the City's unpaid portion of its annual contribution owed to the PF VEBA for fiscal year ending June 30, 2012. The Complaint also seeks the imposition of attorneys' fees and interest on the amount owed. **See Complaint, Exhibit A.**

Pontiac has not paid the annual contributions as sought in the Complaint. Defendant filed its Answer to Complaint and Affirmative Defenses on August 15, 2012. Pontiac did not specifically allege that it was not required to pay its annual contribution to the PF VEBA for fiscal year 2012. Further, Pontiac did not allege that any Executive Order terminated the City's obligation to pay into the PF VEBA.

Plaintiffs are entitled to summary disposition by operation of law.

B. Pontiac's obligation to pay its annual contribution to the PF VEBA.

i. Background re: Trust Creation

The City established by Ordinance the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") to provide health, optical and dental life insurance

SULLIVAN, WARD, ASHER & PATTON, P.C.

benefits for retirees who are members of the PFRS and who retired from the City on or after August 22, 1996. The City and the Trustees are the settlors to this Trust, which was created in 1996. The Trust is qualified under the Internal Revenue Code. See Trust, **Exhibit B**.

The Trust was created, much like in other communities, so that the City could obtain certain tax benefits and obtain a more favorable bond rating while pre-funding retiree health care for police officers and fire fighters who retired after August 22, 1996, as well as their spouses and dependents. The unions who bargained on behalf of the Police and Fire employees at the time the Trust was created received a benefit in that the Trust was a mechanism that would pre-fund retiree health care, invest those funds and exist to ensure that retiree health care benefits would be paid in perpetuity.

The Trust Agreement required the City to fund 100% of health care benefits to those eligible under the Trust, at a specific level of coverage. The City was also obligated to provide dental, hearing, vision and life insurance coverage. *Id.*

Presently, the PF VEBA Trust has over \$31 million dollars in assets. The City is required to pay an annual contribution to the PF VEBA Trust, according to an actuarial valuation report. See June 8, 2011 actuarial valuation report as **Exhibit C**. The City failed to make its annual contribution to the PF VEBA for the fiscal year ending June 30, 2011 and fiscal year ending June 30, 2012.

Plaintiff filed suit against the City for its failure to pay its FY 2011 contribution. The case, 2011-121551-CZ, was assigned to Honorable Leo Bowman. After protracted litigation, the City paid \$3,243,232.17, or the City's annual contribution, as required by the actuarial valuation report for FY 2011.

ii. Applicable Trust Language

Importantly, the Trust Agreement states as follows:

...the City notes the cost savings involved with respect to the history regarding this proposal." Page 1, **Exhibit B**.

The City was required to make contributions, defined as

"the payment required to be made to the Trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan. Section 3, page 2-3, **Exhibit B**.

The City-Employer shall be required to pay to the Trust Funds such amounts as the Trustees may determine or actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the actuary for the Trust to result in a prefunded plan. Article III, Section 1. Page 6-7, *Id*.

The Trust also states:

The purpose of this Trust Fund known as the "City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust" is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan established in accordance with the terms of the Trust Fund. The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution. Section 1 page 4. (Emphasis added). *Id*.

This Trust...is created for the exclusive purpose of providing ...group health and hospitalization and dental and optical insurance in accordance with the Collective Bargaining Agreements between the City and applicable police and fire collective bargaining associations. Section 3, Page 5. *Id*.

The Trust described herein shall be irrevocable...Section 4, page 6. *Id*.

The Trustees shall carry out the purposes of this Trust Agreement and may maintain any health benefit programs and insurance policy or policies now or in force and effect and available to police and fire retirees of the City of Pontiac or may substitute other comparable or

superior policies in lieu thereof. Article V, Section 2 page 12. (Emphasis added). Id.

The Trustees shall have the right and duty to enforce payment of all contributions provided for in the Collective Bargaining Agreement and the performance of all obligations provided in this Trust. Article V, Section 4, page 13. (Emphasis added). Id.

The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, except as provided by the terms of the Collective Bargaining Agreements between the collective bargaining associations and the City and the terms of this Trust Agreement. Article VII, Section 1, page 22. Id.

C. The Amount Owed by the City to the PF VEBA.

According to its consistent practice, the Trustees of each Board hired an actuarial firm to prepare the annual actuarial valuation for the PF VEBA.

The actuary computed the City's required contribution to the PF VEBA Trust to be \$4,381,269.00, or 44.65% of valuation payroll. See pp 2-3 of **Exhibit C**. Plaintiffs have calculated this sum, based on payroll data from the City, to be \$3,473,923.28. The payroll was calculated in the same manner as stated above, based on the City's outsourcing of police and fire personnel during the subject fiscal year.

Plaintiffs sent written demand to the City on July 9, 2012, demanding payment. The City did not respond.

D. Executive Order 225

Pontiac's motion claims it is not obligated to pay into the PF Veba pursuant to Executive Order 225, which became effective August 1, 2012. Executive order 225 purports to unilaterally amend the VEBA Trust so that the City is no longer required to make an annual contribution, as determined by an actuary, to the Police and Fire VEBA Trust. See Executive Order 225, **Exhibit D**.

Plaintiff believes that the Emergency Manager is precluded by law from unilaterally amending the Trust Document.

Plaintiff also believes that this Executive Order violates the terms of the Trust and is not permitted by the Emergency Manager Law in effect at the time the executive orders were issued, known as Public Act 4.

Plaintiff also believes this executive order cannot be applied retroactively to extinguish a debt owed by the City and that was past due before the order was entered.

Plaintiff now moves for summary disposition since there is no genuine issue of material fact that would preclude this Court from entering judgment in favor of Plaintiffs.

LAW AND ARGUMENT

I. THE CITY IS OBLIGATED TO PAY PLAINTIFF PURSUANT TO TRUST AND ORDINANCE

A. Controlling Standards of Law

The City codified its PF VEBA Trust Agreement as an Ordinance. The City is obligated to make annual contributions for certain health care benefits for eligible participants according to the terms of the Ordinance. The Ordinance requires the City to make certain contributions to the Trust, as follows:

Article 1, Section 3: Contributions - The term "contributions" as used herein, shall be mean the payment required to be made to the trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing collective bargaining agreements or any future collective bargaining agreements for the purpose of providing group health hospitalization and dental and optical and group life insurance for employees, retirees, and beneficiaries covered by the Plan. See pp 2-3, See Exhibit B.

See also, Article 3, Section 1. See pp 6-7 of Exhibit B.

Further, the Trust permits the Trustees to compel and enforce payments of contributions as follows:

Article 3, Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this trust fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the trust and the providing of benefits under various insurance programs. See pp 7-8, **Exhibit B**.

Further, the Ordinance obligates the City to pay the Trust's attorney's fees for the instant suit, as follows:

Article 3, Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the collective bargaining agreement and the performance of all obligations provided in this Trust. ...in a suit or action brought by the Trustees commenced pursuant to this section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees. See pg 8, **Exhibit B**.

B. Application of Law – PF VEBA

The Ordinance clearly required the City to make all appropriate contributions owed to ensure the payment for health care expenses incurred by eligible retirees. The City violated the Ordinance by failing to pay its entire annual contribution for fiscal year 2011-2012. Summary disposition is appropriate and judgment should enter against Defendant in the amount of the unpaid balance.

II. DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA CONSTITUTES A BREACH OF ITS CONTRACT WITH PLAINTIFFS

A. Controlling Standards of Law

An unambiguous contractual provision reflects the parties' intent as a matter of law and "if the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Prods & Concepts Co.* 469 Mich at 375. Thus, Court's may not impose an ambiguity on clear contract language, *Grosse Pointe Park v Mich Muni Liab & Prop Pool* 473 Mich 188, 198 (2005).

The language of the PF VEBA Ordinance/Trust document evidence that the City is obligated to pay all sums due and owing through the City's annual contribution for fiscal year 2011-2012 to ensure that Plaintiff can pay retiree health care benefits to police and fire employees through the City's annual contribution for fiscal year 2011-2012.

B. Application of Law

The City's breach of this contract has caused significant damages to Plaintiff. Most significantly, the failure to pay negatively affects the Systems' fund to liability ratio and creates an unfunded liability. In short, the non-payment ensures that Plaintiffs could not meet their health care benefit obligations as of today's date. Summary disposition in favor of Plaintiff is appropriate.

III. DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA VIOLATES MICHIGAN'S CONSTITUTION.

A. Controlling Standards of Law

Any accrued financial benefits of a public retirement system pension plan are, by constitutional mandate stated in Const. 1963, Article XI, Section 24, a contractual obligation

that cannot be diminished or impaired. This section of the Constitution requires that benefits arising out of account of service rendered in each year be funded during that year.

Michigan's Const. Article 9 §24 provides as follows:

Public Pension Plans and Retirement Systems. Obligation. The accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits, annual funding. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities. (Emphasis added).

The Trust expressly states that all benefits paid by the City are constitutionally protected. The Trust provides as follows:

Article 2. Establishment of Trust, Section 1:

The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan establishing in accordance with the terms of the Trust Fund. **The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution.**

(Emphasis added) See pg 5 of Trust, Exhibit B.

B. Application of Law

The City failed to pay its annual contribution to the PF VEBA for fiscal year July 1, 2011 – June 30, 2012. The City's failure to pay its employer contribution to the PF VEBA is a violation of Article 9 Section 24 of Michigan's constitution. The annual contribution was calculated to be 44.65% of payroll, or \$3,473,923.28. That requirement was communicated to

the City, which did not pay the balance owed. Summary disposition is appropriate since Plaintiffs are entitled to a judgment in this amount.

C. **Defendant's Reliance on Studier is Misplaced - Executive Order 225 is Unlawful Since it Violates Michigan's Constitution and Breaches an Express Contract**

Defendant's reliance on *Studier v. Michigan Public Schools Retirement Board* 472 Mich. 642 (2005) is misplaced. In *Studier*, the Supreme Court examined a statutorily created retirement system. In *Studier*, there was no contractual promise to provide a certain level of health benefits. The Court went on to hold that Michigan's legislatures are free to enact laws that contradict what was done by a prior legislature. Therefore, one legislature's reduction in previously determined health benefits did not violate Michigan's Constitution. If the *Studier* matter involved the contractual promise to provide benefits, like here, the matter would likely have been decided differently.

In the instant matter, the VEBA Trust expressly provides that health care benefits are intended to be constitutionally protected benefits. See pg. 4, **Exhibit B**. There is a contractual promise to provide a level of benefits to police and fire retirees who are eligible for the VEBA. In fact, the Trust and Collective Bargaining Agreements expressly state that different types of policies could be obtained, but they must be comparable or superior to what was provided in 1996.

Therefore, *Studier* is of no help to Defendant. The health care benefits are constitutionally protected because there was a contractual promise to make them so.

In fact, the *Studier* opinion supports Plaintiff's argument that the benefits are constitutionally protected. In *Studier*, the Court held that in order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable

construction than the legislature intended to be bound to a contract. *Id.* at 662. The *Studier* Court noted that historically, courts were reluctant to infer a contractual obligation on legislation. The Court noted that this reluctance is grounded in the realization that it is easy enough for a statute explicitly to authorize a contract or say explicitly that the benefits are contractual promises...*Id.* at 663.

The *Studier* Court noted that the statutory language did not contain plain language indicating that the legislature intended to be bound by a contract. For example, the legislature did not use contractual terms like contract, covenant or vested rights. *Id.* at 663-664. Further, the legislature did not adopt a policy requiring a particular health plan nor did it preclude a particular health plan. *Id.* at 664. Also, the legislature did not authorize a plan containing specific deductibles and co-pays. Further, the statute did not provide that any changes would only apply to a specific class or group of retirees. *Id.* at 665. Thus, the *Studier* Court held that because there was an absence of clear and unequivocal language showing an intent to contract, the Court would not disturb a legislature's amendment of the retirement system's statute. *Id.* at 665.

In the instant matter, the opposite facts exist. There is a contract which clearly and unequivocally evidences an intent to contract and to provide those benefits as if they were constitutionally protected. The Trust incorporates CBAs which do specify prescription costs, co-pays, deductibles and the types of coverage to be provided. In short, the analysis in *Studier* requires this Court to find that the City of Pontiac contracted with VEBA eligible retirees and agreed to provide a certain level of benefits.

Furthermore, even if the health care benefits were not constitutionally protected, they were certain protected by the terms of the Trust, specifically language that guaranteed these

benefits as constitutionally protected. Defendant has set forth no rationale for how an emergency manager could breach a trust, codified as an ordinance, when his predecessors promised to provide a certain level of benefits. Clearly, these Executive Orders breach that contractual promise and violate the Ordinance which codifies that contract.

IV. EXECUTIVE ORDER 225 VIOLATES THE EMERGENCY MANAGER LAW -P.A. 4

A. Executive Order 225 is not temporary and it singles out one class of employees

MCL 141.1519 set forth the powers of an emergency manager. This provision exists within what is collectively referred to as PA 4, the Emergency Manager Law. This law was suspended on August 8, 2012 when a requisite number of signatures to place the issue on a ballot referendum were obtained. Michigan's voters then voted to repeal Public Act 4. Michigan's legislature subsequently revised the Act, now known as PA 436, which is scheduled to become effective approximately April 1, 2013.

The enumerated powers of an emergency manager permit the modification of an existing collective bargaining agreement under several conditions. One of these conditions is that the modification must be temporary and does not target specific classes of employees. These orders are clearly not temporary. MCL 141.1519(K)(4). The orders are not limited in scope and will exist in perpetuity. Additionally, the amendment violates the Emergency Manager Act because it is "(1) not temporary; and (2) is directed at a specific class of employees." The Executive Order 225 specifically states that its intent is to stop paying the City's annual contribution into the VEBA Trust for several years. This is the opposite of temporary. Further, it applies only to those retirees who retired after August 22, 1996, a specific class of employees. The Executive Orders only apply to those police and fire retirees who are eligible for the VEBA. The VEBA-eligible members constitute one portion of the

police and fire retirees. Clearly, the Emergency Manager singled out these individuals by terminating payment into the PF VEBA.

B. Executive Order 225 should not be applied retroactively

The City's annual contribution to the PF VEBA for fiscal year 2012 was due no later than June 30, 2012. On July 1, 2012, the amount was past due. On August 1, 2012, the Emergency Manager issued Executive Order 225 and is now arguing that this Order terminates the City's obligation to pay into the VEBA Trust. This Executive Order should not be applied retroactively. The Emergency Manager should not be permitted to retroactively extinguish an existing, and past due, debt through an Executive Order.

MCL 141.1519 sets forth the enumerated powers of an emergency manager. Admittedly, the emergency manager has the ability to reject or modify a contract. MCL 141.1519(1)(k). Further, the emergency manager can enter into agreements with creditors. MCL 141.1519(1)(w).

However, Defendants are unaware of any precedent giving an emergency manager authority to retroactively extinguish a debt. Although there are few reported cases on this relatively new topic, all of the cases found by Plaintiff's counsel involve situations where an emergency manager issued an executive order modifying a contract on a prospective basis. In *NCO Acquisition LLC v Snyder*, 2012 U.S. Dist. LEXIS 141725, a property manager challenged an emergency manager's modification of lease agreements. The modification was conditional (it gave the emergency manager the authority to terminate a lease early, if he so chose subsequent to entry of the order) and was applied on prospective basis.

In *Welch v Brown* 2013 U.S. Dist. LEXIS 45681 (March 29, 2013), the parties litigated the Flint emergency manager's modification of collective bargaining agreements which would

have reduced retiree health care benefits. The Court entered an injunction which stopped these prospective changes to retiree health care.

In *City of Pontiac Retired Employees v City of Pontiac* 2012 U.S. Dist. LEXIS 98858 (July 17, 2012), a group of retirees challenged the Pontiac emergency manager's modification of collective bargaining agreements which would reduce health care on a prospective basis.

There is no language within case law precedent or Public Act 4 which suggests that an emergency manager can issue executive orders which terminate debt. However, this is exactly what the City is attempting to do in this matter. If, hypothetically, the waste management contractor for the City of Pontiac was owed a sum of money pursuant to contract, and the City issued an executive order terminating the City's obligation to pay that contract, such an executive order would not pass muster. PA 4 provides many tools for an emergency manager to fix the finances of a municipality or school district. However, it does not give the power to "erase" past due debts.

CONCLUSION

WHEREFORE, Plaintiff respectfully request that this Honorable Court deny Defendant's motion for summary disposition; further, that this Honorable Court grant its

Motion for Summary Disposition pursuant to MCR 2.116 (I)(2) and enter Judgment in favor of the PF VEBA in the amount of \$3,473,923.28;

Respectfully submitted,

SULLIVAN, WARD, ASHER & PATTON, P.C.

By: /s/Matthew I. Henzi
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Dated: April 10, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2013, my secretary, Laura Kimmell, electronically filed the Plaintiff's Response to Defendant's Motion for Summary Disposition, Brief in Support and this Certificate of Service with the Clerk of the Court using the WIZNET system which will send notification of such filing to counsel of record.

By: /s/Matthew I. Henzi
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EXHIBIT H

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

IN THE COURT OF APPEALS

(On Appeal from the Circuit Court for the County of Oakland)

BOARD OF TRUSTEES OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH AND
INSURANCE TRUST

Plaintiff/Appellant

v.

CITY OF PONTIAC, MICHIGAN
Defendant/Appellee

COURT OF APPEALS NO.316418

Oakland County Circuit Court
No. 12-128625-CZ

Hon. Daniel P. O'Brien

Matthew I. Henzi (P57334)
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PROOF OF SERVICE

Laura A. Kimmell says that on the 20th day of November, 2013, she served Plaintiff-Appellant's Brief on Appeal by placing said documents in the first class, US Mail on counsel of record:

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Troy MI 48084-5280

I hereby declare that the statement above is true to the best of my knowledge, information and belief.

Laura A. Kimmell
Laura A. Kimmell

IN THE COURT OF APPEALS

(On Appeal from the Circuit Court for the County of Oakland)

BOARD OF TRUSTEES OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH AND
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Plaintiff/Appellant

v.

CITY OF PONTIAC, MICHIGAN
Defendant/Appellee

COURT OF APPEALS NO.316418

Oakland County Circuit Court
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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

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SULLIVAN, WARD, ASHER & PATTON, P.C.

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STATEMENT OF APPELLATE JURISDICTION

Plaintiff appeals a May 10, 2013 order granting summary disposition in favor of Defendant.

This Court maintains jurisdiction according to MCR 7.203(A)(1), since Plaintiff is appealing a final order of the Oakland County Circuit Court.

STATEMENT OF ISSUE PRESENTED

- I. **DID THE TRIAL COURT ERR WHEN IT GRANTED DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND HELD THAT DEFENDANT'S UNILATERAL TERMINATION OF FUNDING OF PLAINTIFF TRUST WAS LAWFUL?**

Plaintiff-Appellant says "Yes."

Defendant-Appellee says "No."

The trial court said "No."

SULLIVAN, WARD, ASHER & PATTON, P.C.

STATEMENT OF FACTS

A. Introduction

Defendant City of Pontiac ("Pontiac" or "Defendant") owes Plaintiff Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") the sum of 3,473,923.28, plus interest. This amount represents the unpaid balance of Pontiac's required, annual contribution payable to Plaintiff for fiscal year July 1, 2011-June 30, 2012.

Pontiac has paid its annual contribution to Plaintiff for decades, in response to Plaintiff's annual, actuarial valuation report. However, Pontiac failed to pay its annual contribution for fiscal year 2012. This amount was due on or before June 30, 2012.

B. Procedural History.

On August 8, 2012, Plaintiff filed its six-count Complaint against the City of Pontiac to compel payment of the City's annual contribution to Plaintiffs for fiscal year July 1, 2011-June 30, 2012. See Complaint, **Exhibit A**. The claims brought by Plaintiff City of Pontiac Police and Fire Retirement System ("PFRS") were dismissed when Pontiac paid its annual, actuarially required contribution to the PFRS.

Defendant filed its Answer to Complaint and Affirmative Defenses on August 15, 2012. Pontiac did not specifically allege that it was not required to pay its annual contribution to the PF VEBA for fiscal year 2012. Further, Pontiac did not allege that any Executive Order terminated the City's obligation to pay into the PF VEBA.

Defendant filed a motion for summary disposition. Plaintiff responded and requested summary disposition pursuant to MCR 2.116 (l)(2). The trial court heard

the cross-motions for summary disposition on May 1, 2013. See transcript from motion hearing, **Exhibit B**.

On May 10, 2013, the trial court entered an order which granted summary disposition and dismissed Plaintiff's Complaint, with prejudice. See order, **Exhibit C**.

Plaintiff filed the instant appeal, and now files its Brief on Appeal, seeking reversal of the trial court's final order.

C. Pontiac's obligation to pay its annual contribution to the PF VEBA.

i. Background re: Trust Creation

The City established by Ordinance the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") to provide health, optical and dental life insurance benefits for retirees who are members of the PFRS and who retired from the City on or after August 22, 1996. The City and the Trustees are the settlors to this Trust, which was created in 1996. The Trust is qualified under the Internal Revenue Code. See Trust, **Exhibit D**.

The Trust was created, much like in other communities, so that the City could obtain certain tax benefits and obtain a more favorable bond rating while pre-funding retiree health care for police officers and fire fighters who retired after August 22, 1996, as well as their spouses and dependents. The unions who bargained on behalf of the Police and Fire employees at the time the Trust was created received a benefit in that the Trust was a mechanism that would pre-fund retiree health care, invest those funds and exist to ensure that retiree health care benefits would be paid in perpetuity.

The Trust Agreement required the City to fund 100% of health care benefits to those eligible under the Trust, at a specific level of coverage. The City was also obligated to provide dental, hearing, vision and life insurance coverage. *Id.*

At the time of the motion hearing, the PF VEBA Trust had over \$31 million dollars in assets. The City is required to pay an annual contribution to the PF VEBA Trust, according to an actuarial valuation report. See June 8, 2011 actuarial valuation report as **Exhibit E**. The City failed to make its annual contribution to the PF VEBA for the fiscal year ending June 30, 2011 and fiscal year ending June 30, 2012.

Plaintiff filed suit against the City for its failure to pay its FY 2011 contribution. The case, 2011-121551-CZ, was assigned to Honorable Leo Bowman. After protracted litigation, the City paid \$3,243,232.17, or the City's annual contribution, as required by the actuarial valuation report for FY 2011. The City refused to pay the contribution owed for FY 2012.

ii. **Applicable Trust Language**

Importantly, the Trust Agreement states as follows:

...the City notes the cost savings involved with respect to the history regarding this proposal." Page 1, **Exhibit D**.

The City was required to make contributions, defined as

"the payment required to be made to the Trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan. Section 3, page 2-3, **Exhibit D**.

The City-Employer shall be required to pay to the Trust Funds such amounts as the Trustees may determine or actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the actuary for the Trust to result in a prefunded plan. Article III, Section 1. Page 6-7, Id.

The Trust also states:

The purpose of this Trust Fund known as the "City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and Trust" is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan established in accordance with the terms of the Trust Fund. The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution. Section 1 page 4. (Emphasis added). Id.

This Trust...is created for the exclusive purpose of providing ...group health and hospitalization and dental and optical insurance in accordance with the Collective Bargaining Agreements between the City and applicable police and fire collective bargaining associations. Section 3. Page 5. Id.

The Trust described herein shall be irrevocable...Section 4, page 6. Id.

The Trustees shall carry out the purposes of this Trust Agreement and may maintain any health benefit programs and insurance policy or policies now or in force and effect and available to police and fire retirees of the City of Pontiac or may substitute other comparable or superior policies in lieu thereof. Article V, Section 2 page 12. (Emphasis added). Id.

The Trustees shall have the right and duty to enforce payment of all contributions provided for in the Collective Bargaining Agreement and the performance of all obligations provided in this Trust. Article V, Section 4, page 13. (Emphasis added). Id.

The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, except as provided by the terms of the Collective Bargaining Agreements between the collective bargaining associations and the City and the terms of this Trust Agreement. Article VII, Section 1, page 22. Id.

D. The Amount Owed by the City to the PF VEBA For Fiscal Year 2012.

According to its consistent practice, the Trustees of each Board hired an actuarial firm to prepare the annual actuarial valuation for the PF VEBA.

The actuary computed the City's required contribution to the PF VEBA Trust to be \$4,381,269.00, or 44.65% of valuation payroll. See pp 2-3 of **Exhibit E**. Plaintiff calculated this sum, based on payroll data from the City, to be \$3,473,923.28. The payroll was calculated in the same manner as stated above, based on the City's outsourcing of police and fire personnel during the subject fiscal year.

E. Executive Order 225

In its motion for summary disposition, Pontiac claimed it was not obligated to pay into the PF VEBA pursuant to Executive Order 225, which became effective August 1, 2012, seven (7) days before Plaintiff filed its complaint. Pontiac did not raise this argument as an affirmative defense.

Executive order 225 sought to unilaterally amend the PF VEBA Trust so that the City was no longer required to make an annual contribution, as determined by an actuary, to the PF VEBA Trust. See Executive Order 225, **Exhibit F**.

Plaintiff believes that the Emergency Manager is precluded by law from unilaterally amending the Trust Document.

Plaintiff also believes that this Executive Order violates the terms of the Trust and is not permitted by the Emergency Manager Law in effect at the time the executive orders were issued, known as Public Act 4.

Plaintiff also believes this executive order cannot be applied retroactively to extinguish a debt owed by the City and that was past due before the order was entered.

LAW AND ARGUMENT

I. DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA VIOLATES THE TRUST AND CITY ORDINANCE

A. Standard of Review.

As this appeal is from an order granting summary disposition, appellate review is de novo. *Spiek v Department of Transportation*, 456 Mich 331, 337 (1998).

B. Controlling Standards of Law

The City codified its PF VEBA Trust Agreement as an Ordinance. The City is obligated to make annual contributions for certain health care benefits for eligible participants according to the terms of the Ordinance. The Ordinance requires the City to make certain contributions to the Trust, as follows:

Article 1, Section 3: Contributions - The term "contributions" as used herein, shall be mean the payment required to be made to the trustees and to the Trust Fund by the City under the authority such as Ordinance or City Council resolution or under any applicable existing collective bargaining agreements or any future collective bargaining agreements for the purpose of providing group health hospitalization and dental and optical and group life insurance for employees, retirees, and beneficiaries covered by the Plan. See pp 2-3, **See Exhibit D.**

See also, Article 3, Section 1. See pp 6-7 of **Exhibit D.**

Further, the Trust permits the Trustees to compel and enforce payments of contributions as follows:

Article 3, Section 2: The Trustees may compel and enforce payments of contributions in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

Section 3: As regards all payments to this trust fund, time is of the essence. The parties recognize that the regular and timely payments of contributions are essential to the operation of the trust and the providing of benefits under various insurance programs. See pp 7-8, **Exhibit D**.

Further, the Ordinance obligates the City to pay the Trust's attorney's fees for the instant suit, as follows:

Article 3, Section 4: The Trustees shall establish a uniform system for the timely transmission of required reports and contributions from the City on behalf of participants. The Trustees shall have the right and duty to enforce payment of all contributions provided for in the collective bargaining agreement and the performance of all obligations provided in this Trust. ...in a suit or action brought by the Trustees commenced pursuant to this section, the party in default agrees to pay all costs and expenses, including reasonable attorneys' fees. See pg 8, **Exhibit D**.

C. Application of Law

The Ordinance clearly required the City to make all appropriate contributions owed to ensure the payment for health care expenses incurred by eligible retirees. The City violated the Ordinance by failing to pay its entire annual contribution for fiscal year 2011-2012. Summary disposition is appropriate and judgment should enter against Defendant in the amount of the unpaid balance.

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SULLIVAN, WARD, ASHER & PATTON, P.C.

II. **DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA CONSTITUTES A BREACH OF ITS CONTRACT WITH PLAINTIFFS**

A. **Standard of Review.**

As this appeal is from an order granting summary disposition, appellate review is de novo. *Spiek v Department of Transportation*, 456 Mich 331, 337 (1998).

B. **Controlling Standards of Law**

An unambiguous contractual provision reflects the parties' intent as a matter of law and "if the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Prods & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich 362, 375 (2003). Thus, Court's may not impose an ambiguity on clear contract language, *Grosse Pointe Park v Mich Muni Liab & Prop Pool*, 473 Mich 188, 198 (2005).

The language of the PF VEBA Ordinance/Trust document evidence that the City is obligated to pay all sums due and owing through the City's annual contribution for fiscal year 2011-2012 to ensure that Plaintiff can pay retiree health care benefits to police and fire employees through the City's annual contribution for fiscal year 2011-2012.

C. **Application of Law**

The City's breach of this contract has caused significant damages to Plaintiff. Most significantly, the failure to pay negatively affects the Systems' fund to liability ratio and creates an unfunded liability. In short, the non-payment ensures that Plaintiffs could not meet their health care benefit obligations as of today's date. Summary disposition in favor of Plaintiff is appropriate.

III. DEFENDANT'S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA VIOLATES MICHIGAN'S CONSTITUTION.

A. Standard of Review.

As this appeal is from an order granting summary disposition, appellate review is de novo. *Spiek v Department of Transportation*, 456 Mich 331, 337 (1998).

B. Controlling Standards of Law

Any accrued financial benefits of a public retirement system pension plan are, by constitutional mandate stated in *Const. 1963, Article XI, Section 24*, a contractual obligation that cannot be diminished or impaired. This section of the Constitution requires that benefits arising out of account of service rendered in each year be funded during that year.

Michigan's Const. Article 9 §24 provides as follows:

Public Pension Plans and Retirement Systems. Obligation. The accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits, annual funding. **Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year** and such funding shall not be used for financing unfunded accrued liabilities. (Emphasis added).

The Trust expressly states that all benefits paid by the City are constitutionally protected. The Trust provides as follows:

Article 2. Establishment of Trust, Section 1:

The purpose of this Trust Fund known as the City of Pontiac Police and Fire Retirees Prefunded Group Health Plan and

Trust is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan establishing in accordance with the terms of the Trust Fund. **The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution.**

(Emphasis added) See pg 5 of Trust, Exhibit D.

C. Application of Law

The City failed to pay its annual contribution to the PF VEBA for fiscal year July 1, 2011 – June 30, 2012. The City's failure to pay its employer contribution to the PF VEBA is a violation of Article 9 Section 24 of Michigan's constitution. The annual contribution was calculated to be 44.65% of payroll, or \$3,473,923.28. That requirement was communicated to the City, which did not pay the balance owed. Summary disposition is appropriate since Plaintiffs are entitled to a judgment in this amount.

D. Defendant's Reliance on Studier in Misplaced - Executive Order 225 is Unlawful Since it Violates Michigan's Constitution and Breaches an Express Contract

Defendant's reliance on *Studier v. Michigan Public Schools Retirement Board* 472 Mich. 642 (2005) is misplaced. In *Studier*, the Supreme Court examined a statutorily created retirement system. In *Studier*, there was no contractual promise to provide a certain level of health benefits. The Court went on to hold that Michigan's legislatures are free to enact laws that contradict what was done by a prior legislature. Therefore, one legislature's reduction in previously determined health benefits did not violate Michigan's Constitution. If the *Studier* matter involved the contractual promise to provide benefits, like here, the matter would likely have been decided differently.

In the instant matter, the VEBA Trust expressly provides that health care benefits are intended to be constitutionally protected benefits. See pg. 4, **Exhibit D**. There is a contractual promise to provide a level of benefits to police and fire retirees who are eligible for the VEBA. In fact, the Trust and Collective Bargaining Agreements expressly state that different types of policies could be obtained, but they must be comparable or superior to what was provided in 1996.

Therefore, *Studier* is of no help to Defendant. The health care benefits are constitutionally protected because there was a contractual promise to make them so.

In fact, the *Studier* opinion supports Plaintiff's argument that the benefits are constitutionally protected. In *Studier*, the Court held that in order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than the legislature intended to be bound to a contract. *Id.* at 662. The *Studier* Court noted that historically, courts were reluctant to infer a contractual obligation on legislation. The Court noted that this reluctance is grounded in the realization that it is easy enough for a statute explicitly to authorize a contract or say explicitly that the benefits are contractual promises. *Id.* at 663.

The *Studier* Court noted that the statutory language did not contain plain language indicating that the legislature intended to be bound by a contract. For example, the legislature did not use contractual terms like contract, covenant or vested rights. *Id.* at 663-664. Further, the legislature did not adopt a policy requiring a particular health plan nor did it preclude a particular health plan. *Id.* at 664. Also, the legislature did not authorize a plan containing specific deductibles and co-pays. Further, the statute did not provide that any changes would only apply to a specific

class or group of retirees. *Id.* at 665. Thus, the *Studier* Court held that because there was an absence of clear and unequivocal language showing an intent to contract, the Court would not disturb a legislature's amendment of the retirement system's statute. *Id.* at 665.

In the instant matter, the opposite facts exist. There is a contract which clearly and unequivocally evidences an intent to contract and to provide those benefits as if they were constitutionally protected. The Trust incorporates CBAs which do specify prescription costs, co-pays, deductibles and the types of coverage to be provided. In short, the analysis in *Studier* requires this Court to find that the City of Pontiac contracted with VEBA eligible retirees and agreed to provide a certain level of benefits.

Furthermore, even if the health care benefits were not constitutionally protected, they were certain protected by the terms of the Trust, specifically language that guaranteed these benefits as constitutionally protected. Defendant has set forth no rationale for how an emergency manager could breach a trust, codified as an ordinance, when his predecessors promised to provide a certain level of benefits. Clearly, these Executive Orders breach that contractual promise and violate the Ordinance which codifies that contract.

IV. EXECUTIVE ORDER 225 VIOLATES THE EMERGENCY MANAGER LAW -P.A. 4

A. Standard of Review.

As this appeal is from an order granting summary disposition, appellate review is de novo. *Spiek v Department of Transportation*, 456 Mich 331, 337 (1998).

B. Controlling Standards of Law

i. Executive Order 225 is not temporary and it singles out one class of employees

MCL 141.1519 set forth the powers of an emergency manager. This provision exists within what is collectively referred to as PA 4, the Emergency Manager Law. This law was suspended on August 8, 2012 when a requisite number of signatures to place the issue on a ballot referendum were obtained. Michigan's voters then voted to repeal Public Act 4. Michigan's legislature subsequently revised the Act, now known as PA 436, which is scheduled to become effective approximately April 1, 2013.

The enumerated powers of an emergency manager permit the modification of an existing collective bargaining agreement under several conditions. One of these conditions is that the modification must be temporary and does not target specific classes of employees. These orders are clearly not temporary. MCL 141.1519(K)(4). The orders are not limited in scope and will exist in perpetuity. Additionally, the amendment violates the Emergency Manager Act because it is "(1) not temporary; and (2) is directed at a specific class of employees." The Executive Order 225 specifically states that its intent is to stop paying the City's annual contribution into the VEBA Trust for several years. This is the opposite of temporary. Further, it applies only to those

retirees who retired after August 22, 1996, a specific class of employees. The Executive Orders only apply to those police and fire retirees who are eligible for the VEBA. The VEBA-eligible members constitute one portion of the police and fire retirees. Clearly, the Emergency Manager singled out these individuals by terminating payment into the PF VEBA.

ii. Executive Order 225 should not be applied retroactively

The City's annual contribution to the PF VEBA for fiscal year 2012 was due no later than June 30, 2012. On July 1, 2012, the amount was past due. On August 1, 2012, the Emergency Manager issued Executive Order 225 and is now arguing that this Order terminates the City's obligation to pay into the VEBA Trust. This Executive Order should not be applied retroactively. The Emergency Manager should not be permitted to retroactively extinguish an existing, and past due, debt through an Executive Order.

MCL 141.1519 sets forth the enumerated powers of an emergency manager. Admittedly, the emergency manager has the ability to reject or modify a contract. MCL 141.1519(1)(k). Further, the emergency manager can enter into agreements with creditors. MCL 141.1519(1)(w).

However, Defendants are unaware of any precedent giving an emergency manager authority to retroactively extinguish a debt. Although there are few reported cases on this relatively new topic, all of the cases found by Plaintiff's counsel involve situations where an emergency manager issued an executive order modifying a contract on a prospective basis. In *NCO Acquisition LLC v Snyder*, 2012 U.S. Dist. LEXIS 141725 (E.D. Mich., September 29, 2012), a property manager challenged an

emergency manager's modification of lease agreements. The modification was conditional (it gave the emergency manager the authority to terminate a lease early, if he so chose subsequent to entry of the order) and was applied on prospective basis.

In *Welch v Brown* 2013 U.S. Dist. LEXIS 45681 (E.D. Mich. March 29, 2013), the parties litigated the Flint emergency manager's modification of collective bargaining agreements which would have reduced retiree health care benefits. The Court entered an injunction which stopped these prospective changes to retiree health care.

In *City of Pontiac Retired Employees v City of Pontiac* 2012 U.S. Dist. LEXIS 98858 (E.D. Mich. July 17, 2012), a group of retirees challenged the Pontiac emergency manager's modification of collective bargaining agreements which would reduce health care on a prospective basis.

C. Application of Law:

Plaintiff believes that, according to the terms of the Trust, the Emergency Manager is precluded by law from unilaterally amending the Trust Document.

Plaintiff also believes that this Executive Order violates the terms of the Trust and is not permitted by the Emergency Manager Law in effect at the time the executive orders were issued, known as Public Act 4. Executive Order 225 singles out police and fire retirees who retired after August 22, 1996. Further, It also fails because it is not temporary. Respectfully, the trial court erred by stating that "temporary" could exist for 20 years. See pg. 24 of **Exhibit B**.

Respectfully, the trial court erred when it determined the executive order to be lawful because the emergency manager is the Governor's agent and because the

Treasurer approved the order. The trial court failed to focus on whether the order singled out a class of employees and whether an order with no termination date could be temporary.

Plaintiff also believes this executive order cannot be applied retroactively to extinguish a debt owed by the City and that was past due before the order was entered.

There is no language within case law precedent or Public Act 4 which suggests that an emergency manager can issue executive orders which terminate debt. However, this is exactly what the City is attempting to do in this matter. If, hypothetically, the waste management contractor for the City of Pontiac was owed a sum of money pursuant to contract, and the City issued an executive order terminating the City's obligation to pay that contract, such an executive order would not pass muster. PA 4 provides many tools for an emergency manager to fix the finances of a municipality or school district. However, it does not give the power to "erase" past due debts.

SULLIVAN, WARD, ASHER & PATTON, P.C.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests that this Honorable Court REVERSE the trial court's May 10, 2013 Order and Grant summary disposition in favor of Plaintiff-Appellant.

Respectfully submitted,

**SULLIVAN, WARD,
ASHER & PATTON, P.C.**

By: /s/ Matthew I. Henzi
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Dated: November 18, 2013
W1377942.DOC

SULLIVAN, WARD, ASHER & PATTON, P.C.

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

(On Appeal from the Circuit Court for the County of Oakland)

**BOARD OF TRUSTEES OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH AND
INSURANCE TRUST**

Plaintiff/Appellant

v.

CITY OF PONTIAC, MICHIGAN
Defendant/Appellee

COURT OF APPEALS NO.316418

Oakland County Circuit Court
No. 12-128625-CZ

Hon. Daniel P. O'Brien

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INDEX OF EXHIBITS

- Exhibit A - Complaint**
- Exhibit B - Transcript**
- Exhibit C - Court Order Dated May 10, 2013**
- Exhibit D - Trust**
- Exhibit E - Valuation Report**
- Exhibit F - Emergency Order 225**

EXHIBIT I

*Board of Trustees of the City of Pontiac Police and Fire Retiree
Prefunded Group Health and Insurance Trust v City of Pontiac*
COA No. 316418

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

STATE OF MICHIGAN
COURT OF APPEALS

BOARD OF TRUSTEES OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH &
INSURANCE TRUST,

FOR PUBLICATION
March 17, 2015
9:05 a.m.

Plaintiff-Appellant,

v

CITY OF PONTIAC,

No. 316418
Oakland Circuit Court
LC No. 2012-128625-CZ

Defendant-Appellee.

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Plaintiff Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Plan (trustees) appeals by right Oakland Circuit Judge Daniel Patrick O'Brien's order granting defendant's motion for summary disposition as to plaintiff's complaint to require the city to pay its required annual contribution to the trust for the fiscal year ending June 30, 2012. The trust was established in 1996 as a tax exempt voluntary employees' beneficiary association (VEBA), 26 USC 501(c)(9), to hold the contributions of police and firefighter employees and those of the city pursuant to collective bargaining agreements (CBAs) between the city and the various unions of the city's police officers and firefighters. The trust held and invested these contributions to provide health, optical, dental, and life-insurance benefits to police and fire employees who retired on or after August 22, 1996, as required by the various CBAs. At issue is the efficacy of Executive Order 225 issued on August 1, 2012, pursuant to § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k), by the city's emergency manager (EM), Louis H. Schimmel, which purported to amend the trust to remove the city's annual obligation to contribute to the trust agreement "as determined by the Trustees through actuarial evaluations." The trial court accepted defendant's argument that the city's EM properly modified the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012, by modifying the existing CBAs between the city and police and firefighter unions. The trial court also ruled that plaintiff's claim under Const 1963, art 9, § 24, was without merit pursuant to *Studier v Michigan Pub Sch Employees Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005). We conclude, even assuming that Executive Order 225 was properly adopted pursuant to § 19(1)(k), that it did not retroactively eliminate the city's obligation to contribute to the trust for

the fiscal year ending June 30, 2012; consequently, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2012, the Board of Trustees of the City of Pontiac Police and Fire Retirement System and plaintiff trustees filed their complaint in circuit court asserting that defendant funded the City of Pontiac Police and Fire Retirement System (PFRS), which provided retirement benefits to retired police and fire employees. In addition, plaintiffs asserted that defendant funded the trust, a tax-exempt VEBA, 26 USC 501(c)(9), which provided health, optical, dental, and life-insurance benefits to police and fire employees who retired on or after August 22, 1996. The trust is administered by its board of trustees comprised of five members consisting of the city's mayor, the city's finance director, and a firefighter, a police officer, and a fifth trustee selected by the other trustees, who could be a participant in the trust. Art IV, § 1. Plaintiffs alleged that defendant, through its EM, failed to pay its required contribution to the trust for the fiscal year between July 1, 2011 and June 30, 2012, which was actuarially determined to be \$3,473,923.28. The trust includes the following relevant provisions:

ARTICLE I

Definitions

* * *

Section 3: Contributions - The term Contributions as used herein, shall mean the payment required to be made to the Trustees and to the Trust Fund by the City *under the authority such as ordinance or City Council resolution or under any applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements* for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan.

* * *

ARTICLE II

Establishment of Trust

Section 1: The purpose of this Trust Fund . . . is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan The

Grantor^[1] intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution.

* * *

ARTICLE III

Contributions to the Trust Fund

Section 1: (a) The City-Employer shall be required to pay to the Trust Fund such amounts as the Trustees may determine are actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the Actuary for the Trust to result in a Prefunded Plan.

Such contributions shall also be made in accordance with the Collective Bargaining Agreements between the collective bargaining associations and the employer City and this Trust Agreement, and such other regulations of the Board of Trustees as are not inconsistent with the aforesaid authority.

(b) In addition to the amounts paid by the City on behalf of Participants as set forth above and in the Collective Bargaining Agreements, the City shall contribute to the Trust Fund such additional moneys which together with those contributions and return on investments shall be sufficient to fund the benefits provided on a sound actuarial basis. Participants shall contribute those amounts required for additional extended Family Riders in effect as of 8-22-96 and otherwise as determined by the trustees.

* * *

Section 2. The Trustees may compel and enforce payments of contributions, in any manner they deem proper. The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

* * *

ARTICLE V

Powers and Duties of the Trustees

* * *

¹ "Grantor" is undefined but the "declaration of trust and agreement" is stated to be by the city and the trustees of the trust and is signed by the city's mayor and finance director in that capacity and also in the capacity as trustees and by the other two original trustees.

Section 2: The Trustees shall carry out the purposes of this Trust Agreement, and may maintain any health benefit programs and insurance policy or policies now in force and effect and available to Police and Fire retirees of the City of Pontiac or may substitute other comparable or superior policies in lieu thereof. In providing group life insurance to the Participants of this Plan so as to effectuate the purposes of this Trust Agreement, the Trustees shall be bound by the terms of this Trust Agreement *and any applicable Collective Bargaining Agreements between the City and the collective bargaining associations* and shall comply with all applicable laws.

* * *

ARTICLE VII

Liabilities of the Parties

Section 1: The City shall not be liable for payment to the Trust of any amounts other than those required of it by this Trust Agreement or any applicable Collectible Bargaining Agreement. The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, *except as provided by the terms of the Collective Bargaining Agreements* between the collective bargaining association and the City and the terms of this Trust Agreement. . . .

* * *

ARTICLE X

Amendments

Section 1: The provisions of this Declaration of Trust and Agreement may be amended at any time, by (A) collective bargaining between the collective bargaining associations identified in Article 1, Section 8 and the City of Pontiac (B) by a unanimous vote of the five (5) Trustees, concurred in by the City Council of the City of Pontiac provided, however, that such Amendments are not inconsistent with any applicable Collectible Bargaining Agreements and do not adversely affect the tax exempt status of the 501(c)9 Trust. . . . [Declaration of Trust, executed January 30, 1997 (emphasis added).]

Although the plain language of the trust does not directly state when a required contribution is due, plaintiff asserts and defendant agrees that the actuarial required contribution to the trust for the fiscal year commencing July 1, 2011 and ending June 30, 2012, was due on or before June 30, 2012. It is also undisputed that during the fiscal year ending June 30, 2012, the city's EM entered termination collective bargaining agreements with the various police and firefighter unions. The city also contracted to receive police services from Oakland County effective August 1, 2011, and fire services from Waterford Township, effective February 1, 2012.

On August 1, 2012, the city's EM issued Executive Order (EO) 225 that purported to amend the trust pursuant to MCL 141.1519(1)(k) of 2011 PA 4, to terminate the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012. The order read with respect to its substantive provision as follows:

Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations.

The Order shall have immediate effect.

The issuance of EO 225 was preceded by the EM's letter of July 10, 2012 to State Treasurer Andrew Dillon, seeking concurrence in the EM's plan to invoke the authority of § 19(1)(k) of PA 4 to modify the trust by modifying existing CBAs to eliminate the city's obligation to contribute to the trust. The letter outlined provisions of the trust regarding contributions, art III, §§ (1)(a) & (b), and its provisions regarding amendments, art X, § (1). The EM also stated in the letter that he "anticipated that the City will be required by the Trustees of the VEBA to contribute \$3,915,371 during the fiscal year ending June 30, 2013."

In further making the case for the exercise of authority under § 19(1)(k) of PA 4, the EM wrote that he was unable to negotiate with local police and firefighter unions because the city had contracted for police and firefighter services, and the local unions no longer existed. The EM also noted that amendment of the trust by unanimous action of the trustees under art X would not occur. The EM observed that "[u]nless action is taken to eliminate the VEBA contribution obligation the City anticipates that it will not be able to make the annual contribution required by the Trustees in June 2012, and for subsequent years thereafter." The EM also noted the termination of the city's obligation to the trust for the fiscal year ending June 30 2012, would not create a hardship because the trust had sufficient assets to fund retiree insurance benefits for "a significant number of years going forward." The EM then stated that the "amount saved in the fiscal year beginning July 1, 2012, by a modification of the collective bargaining agreements obligations of the trust will significantly contribute to the City's ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year beginning June [sic] 1, 2012, and thereafter." The EM concluded his request for authority by noting: "Time is of the essence. The new fiscal year starts July 1, 2012. In order to have maximum impact on the 2012/2013 fiscal year given the time frames of the notice Trustees of this action, I urge prompt consideration for this request."

The State Treasurer responded to the EM's July 10, 2012 letter in a letter dated July 16, 2012. In his letter, the State Treasurer outlined the "general economic problem" facing the city. The State Treasurer also reviewed the requirements of § 19(1)(k) of PA 4 to "reject, modify, or terminate one or more terms and conditions of an existing collective bargaining agreement." The State Treasurer also found with respect to the EM's request that the four conditions of MCL 141.1519(1)(k) had been satisfied. The State Treasurer approved the proposed modification without stating to which fiscal year it would commence but stated that the changes "can save the City approximately \$3.9 million annually"

The EM issued Executive Order 225 on August 1, 2012, providing that it “have immediate effect.” On August 8, 2012, plaintiff filed its complaint alleging, with respect to defendant’s failure to pay its actuarially required contribution to the trust, in Count II, a violation of Const 1963, art 9, § 24; in Count IV, a violation of an ordinance; and in Count VI, breach of contract. Plaintiff only challenged defendant’s failure to pay its required contribution to the Trust for the fiscal year July 1, 2011 through June 30, 2012. The other counts in plaintiff’s complaint related to defendant’s failure pay its required contribution to the Pontiac Police and Fire Retirement System. On March 21, 2013, the parties stipulated to dismissing these claims, apparently because the claims had been settled.

On March 6, 2013, defendant moved for summary disposition. In relevant part, defendant argued that Count II was meritless because our Supreme Court held in *Studier*, 472 Mich 642, that Const 1963, art 9, § 24 does not apply to healthcare benefits. Defendant argued that Count IV was meritless because 2011 PA 4 authorized the emergency manager to amend city ordinances, and Count VI was meritless because 2011 PA 4 authorized the emergency manager to modify an existing collective bargaining agreement.

At the conclusion of the motion hearing, the trial court decided to grant defendant’s motion for summary disposition in accordance with defendant’s legal arguments. On May 14, 2013, the trial court entered its order granting defendant’s motion for summary disposition. Plaintiff now appeals by right.

II. STANDARD OF REVIEW

Although the trial court did not identify under which subrule it granted summary disposition, we review the trial court’s decision under the standard applicable to MCR 2.116(C)(10) “because the trial court’s consideration went beyond the parties’ pleadings.” *Kosmalski v St John’s Lutheran Church*, 261 Mich App 56, 59; 680 NW2d 50 (2004). As with all such motions, we review de novo a trial court’s decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277-278; 681 NW2d 342 (2004). The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Summary disposition may be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.*

The proper interpretation of a contract and the legal effect of one of its clauses are legal questions reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 461, 464; 703 NW2d 23 (2005). When determining the meaning of a contract, a court must assign undefined words in the contract their “plain and ordinary meaning that would be apparent to a reader of the instrument.” *Id.* at 464. A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases as they would appear to a reader of the contract. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). After ascertaining the meaning of a contract’s terms, “a court must construe and apply unambiguous contract provisions as written.”

Rory, 473 Mich at 461. Any other legal questions relating to interpretation of the contracts at issue or pertinent statutes are also reviewed de novo. *Studier*, 472 Mich at 649; *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).

III. ANALYSIS

A. REPEAL OF PA 4

2011 PA 4 was “suspended” on August 8, 2012, by the State Board of Canvassers’ certification of the sufficiency of the referendum petitions regarding the act filed on February 29, 2012. See Const 1963, art 2, § 9; MCL 168.477(2); *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 595 n 3, 598, 619-620; 822 NW2d 159 (2012); OAG, 2011-2012, No. 7267, p 72, 78 (August 6, 2012).² The State Board of Canvassers’ certification on November 26, 2012, of the fall general election results disapproving 2011 PA 4 had the effect of repealing the act and reviving the Local Government Fiscal Responsibility Act, 1990 PA 72, MCL 141.1201 *et seq.*, effective on the suspension of 2011 PA 4. See *Martin v Murray*, ___ Mich App ___; ___ NW2d ___ (Docket No. 319509, January 20, 2015), slip op at 2-3; see also *In re Detroit*, 504 BR 191, 216; 2013 Bankr LEXIS 5120 (Banker ED Mich, 12/5/2013), citing *Davis v Roberts*, unpublished order of the Court of Appeals, entered November 16, 2012 (Docket No. 313297). The revived 1990 PA 72 was repealed and replaced by 2012 PA 436, MCL 141.1541 *et seq.*, effective March 28, 2013. See *Martin*, slip op at 2-3; *In re Detroit*, 504 BR at 216, 250.

The parties do not discuss the effect of the suspension of PA 4 one week following the issuance of Executive Order 225 on August 1, 2012. Their arguments assume, however, that the EM’s actions pursuant to PA 4 before its suspension, provided the actions comport with the act’s terms, remain valid and enforceable. We agree. See *Minty v Bd of State Auditors*, 336 Mich 370, 390-391; 58 NW2d 106 (1953), quoting *Cusick v Feldpausch*, 259 Mich 349; 353; 243 NW 226 (1932), quoting 1 Lewis’ Sutherland Statutory Construction (2d ed), § 284:

A law can be repealed by the law-giver; but *the rights which have been acquired under it while it was in force do not thereby cease*. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, *or a legal exemption from a demand made by another*. [Emphasis added; see also *Peters v Goulden*, 27 Mich 171 (1873).]

The legislature has similarly provided that the repeal of a statute will not affect a penalty, forfeiture or liability incurred before the statute’s repeal.

² Opinions of the Attorney General are not binding, but we find OAG, 2011-2012, No. 7267, p 72, 78 (August 6, 2012) persuasive. See *Martin v Murray*, ___ Mich App ___; ___ NW2d ___ (Docket No. 319509, January 20, 2015), slip op at 2, n 2.

The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. [MCL 8.4a.]

Consequently, we conclude that if the EM validly acted pursuant to the authority of 2011 PA 4 to amend existing CBAs such that the terms of trust were modified to remove the city's actuarially required contribution to the trust for the fiscal year ending June 30, 2012, then such action remains valid and enforceable despite the subsequent repeal by referendum of the act.

B. CONST 1963, ART 9, § 24

Count II of plaintiff's complaint alleges a violation of Const 1963, art 9, § 24, which reads in its entirety as follows:

The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

"These two clauses unambiguously prohibit the state and its political subdivisions from diminishing or impairing 'accrued financial benefits,' and require them to fund 'accrued financial benefits' during the fiscal year for which corresponding services are rendered." *Studier*, 472 Mich at 649. But the Court also held that "health care benefits are not 'accrued financial benefits' and, thus, are not protected by Const 1963, art 9, § 24." *Id.* at 670.

Plaintiff does not dispute the holding of *Studier*, but it does argue its claim in the instant case is distinguishable because Article II of the trust reads in relevant part: "The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution." Therefore, plaintiff argues, the plain language of the trust elevates otherwise unprotected health-care benefits to the protection of Const 1963, art 9, § 24. Plaintiff's argument is not premised on the first clause of Const 1963, art 9, § 24; plaintiff asserts that defendant violated the second clause of Const 1963, art 9, § 24 by refusing to fully fund the retirees' future group health-care insurance benefits on an annual basis.

The trial court correctly dismissed this claim. As explained by the Court in *Studier*, the threshold question regarding whether the funding requirement of the second clause of Const 1963, art 9, § 24 applies is whether "accrued financial benefits" are at issue. *Studier*, 472 Mich at 653.

Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits" Thereafter, the second clause seeks to ensure that the state and its political

subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those “financial benefits arising on account of service rendered in each fiscal year” [*Id.* at 654.]

So, because the funding requirement of the second clause of Const 1963, art 9, § 24 only applies to “accrued financial benefits,” and prefunding insurance for future health care benefits are not “accrued financial benefits,” *Studier*, 472 Mich at 654, 670, it follows that the second clause of Const 1963, art 9, § 24 does not apply in this case. Moreover, even if it applied, the second clause of Const 1963, art 9, § 24 does not guarantee any particular method of funding accrued liability of future benefits. *Shelby Twp Police & Fire Ret Bd v Shelby Twp*, 438 Mich 247, 254; 475 NW2d 249 (1991); *Kosa v State Treasurer*, 408 Mich 356, 371-372; 292 NW2d 452 (1980). The trial court correctly concluded that plaintiff’s constitutional claim lacked merit.

C. ORDINANCE VIOLATION

Count IV of plaintiff’s complaint alleges violation of an ordinance. Plaintiff does not identify which ordinance defendant allegedly violated. Rather, plaintiff only cites the provisions of the trust instrument obligating defendant to financially contribute to the trust. Defendant’s alleged violation of these provisions would be properly categorized as breach of contract. “[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.” *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, our research has uncovered no local ordinance concerning health care benefits for retired police and firefighters. Chapter 92 of the Pontiac Municipal Code is titled “Retirement.” The final article, Article IV, §§ 92-101 to 92-125, is titled “Policemen’s and Firemen’s Retirement System.” Article IV apparently governs the PFRS. We are unable to identify any city ordinance governing the trust or health care benefits for retired police and firefighters, nor has plaintiff cited to one. Consequently, we must conclude that the trial court correctly dismissed plaintiff’s claim regarding an ordinance violation with respect to defendant’s funding of the trust.

D. BREACH OF CONTRACT

Count VI of plaintiff’s complaint asserts a claim for breach of contract regarding the actuarial required contribution to the trust for the fiscal year commencing July 1, 2011 through June 30, 2012, which the parties agree was due on or before June 30, 2012. There is no dispute that art III, § 1 of the trust obligates defendant to pay annual contributions to the trust that are determined to be “actuarially necessary” to fund the future health-care benefits of the pertinent retirees as required by the applicable collective bargaining agreements. Indeed, it was this significant ongoing liability that prompted the EM to seek the State Treasurer’s authorization to modify the terms of the trust through the authority of § 19(1)(k) of PA 4, MCL 141.1519(1)(k).

Initially we address whether the EM’s action of issuing EO 225 on August 8, 2012 retroactively eliminates the city’s obligation under the trust and various CBAs that accrued on or before June 30, 2012. On July 1, 2012 the city’s actuarial required contribution to the trust was past due. Consequently, without modification, the city’s obligation to fund the trust was breached on July 1, 2012. See *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458;

761 NW2d 846 (2008) (a breach of contract occurs when a party fails to perform its contractually required duties). We note that although a trust is generally distinguishable from a contract, a promise to place future property in trust may be enforced as a contract right. See 76 Am Jur 2d Trusts § 250, p 309; 2 Restatement Trusts, 3d, § 41, comment c, pp 183-184. Here, reading the trust as whole, the city's obligation to fund the trust flows from the pertinent collective bargaining agreements, and the trust is not an independent contractual obligation. See art I, § 1; art III, § 1(a), cl 2; art V, § 2. As stated in art VII, § 1, "The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, *except as provided by the terms of the Collective Bargaining Agreements* between the collective bargaining association and the City and the terms of this Trust Agreement." (Emphasis added).

At oral argument, the parties disagreed whether the EM could retroactively modify the city's accrued trust liability but otherwise did not cite to pertinent authority to support their respective positions. We agree with defendant's position. Under PA 4, the EM may modify collective bargaining agreements, and, hence, may modify the city's obligation to contribute to the trust. Moreover, the trust itself, art X, § 1 provides it may be "amended at any time" by "collective bargaining" And, after complying with the conditions specified in PA 4, the EM may "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement." MCL 141.1519(1)(k). Because the parties to a collective bargaining agreement could apply its modified terms retroactively, we conclude that the EM also could do so under § 19(1)(k). See *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 326; 550 NW2d 228 (1996): "Generally, parties are free to take from, add to, or modify an existing contract." While a modification would normally require a "meeting of the minds" of the contracting parties, *id.* at 326-327, this requirement is dispensed with where the EM acts pursuant to the authority of § 19(1)(k). Consequently, assuming the EM properly invoked the authority granted by PA 4, the EM could retroactively eliminate the city's actuarial required contribution to the trust for the fiscal year July 1, 2011 through June 30, 2012.

But the question remains whether Executive Order 225, assuming it were properly adopted under the authority of PA 4, did, in fact, eliminate the city's actuarial required contribution to the trust for the fiscal year July 1, 2011 through June 30, 2012. We conclude it did not. The plain language of Executive Order 225 provides that the trust is "amended to remove Article III obligations of the City *to continue to make* contributions to the Trust." (Emphasis added.) The term "continue" means to "go on or keep on without interruption, as in some course or action." *Random House Webster's College Dictionary* (1992). Plainly, the term "continue" relates to present and future action. Further, Executive Order 225 provided it "shall have immediate effect." Because Executive Order 225 was adopted August 1, 2012, given immediate effect and applied to the present of present or future obligations under art III, § 1, by its own terms, it did not apply to the city's already accrued actuarial required contribution to the trust for the already ended fiscal year July 1, 2011 through June 30, 2012.

This plain reading of EO 225 is also supported by the EM's request for concurrence and the State Treasurer's approval of authority granted to the EM to adopt EO 225. In his letter to the State Treasurer of July 10, 2012, after noting the city's article III funding obligation, the EM stated that it was "anticipated that the City will be required by the Trustees of the VEBA to contribute \$3,915,371 *during the fiscal year ending June 30, 2013.*" (Emphasis added.) While the EM also mentioned the city's trust obligation for the fiscal year ending June 30, 2012, he

wrote that the “amount saved *in the fiscal year beginning July 1, 2012*, by a modification of the collective bargaining agreements obligations of the Trust will significantly contribute to the City’s ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year *beginning June [sic] 1, 2012*, and thereafter.” (Emphasis added.) The EM concluded his letter with a request for timely action so as to “have *maximum impact on the 2012/2013 fiscal year . . .*” (Emphasis added.) Thus, although not free of all ambiguity, the July 10, 2012 letter, read as a whole, is a request to amend the city’s trust funding obligation beginning with the fiscal year commencing July 1, 2012.

Similarly, the State Treasurer’s letter of July 16, 2012, determining that the four conditions of MCL 141.1519(1)(k) were satisfied and justified the EM’s proposed action, supports determining that the modification applied to the city’s trust contributions for the fiscal year of July 1, 2012 to June 30, 2013, and thereafter. The State Treasurer, in finding that MCL 141.1519(1)(k)(ii)³ was satisfied, wrote that “[t]he proposed modification of the collective bargaining agreements as to retiree health care contributions to a VEBA is reasonable and necessary” and “changes to language relating to retiree benefits can save the City approximately \$3.9 million annually” The EM’s July 10, 2012 letter referred to a similar amount as the city’s anticipated required contribution to the trust for the fiscal year ending June 30, 2013.

We reverse and remand for further proceedings. We do not retain jurisdiction. No taxable costs are awarded to either party, a public question being involved. MCR 7.219.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood

³ MCL 141.1519(1)(k)(ii) provides: “Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.”

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Court of Appeals, State of Michigan

ORDER

Board of Trustees of the City of Pontiac v City of Pontiac

Docket No. 316418

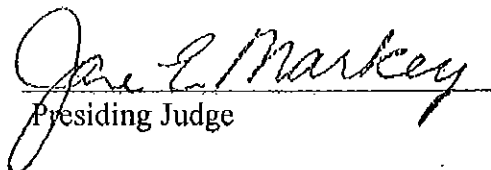
LC No. 2012-128625-CZ

Jane E. Markey
Presiding Judge

Donald S. Owens

Karen M. Fort Hood
Judges

The Court orders that the motion for reconsideration is DENIED.


Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR 24 2015

Date


Chief Clerk

Rec'd
4/29/15
JF